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IN THE

Supreme Court of the United States

JOSÉ FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Alien Tort Act ("ATA"), 28 U.S.C. § 1350, provides as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The questions presented are:

1. Whether the ATA, is simply a grant of jurisdiction, or whether, in addition to granting jurisdiction, it provides a cause of action upon which aliens may sue for torts in violation of the law of nations or treaties of the United States.

2. If the ATA provides a cause of action, whether the actions it authorizes are limited to suits for violations of *jus cogens* norms of international law.

3. Whether a detention that lasts less than 24 hours, results in no physical harm to the detainee, and is undertaken by a private individual under instructions from senior United States law enforcement officials, constitutes a tort in violation of the law of nations actionable under the ATA.

PARTIES TO THE PROCEEDING

Petitioner José Francisco Sosa is a Mexican national resident in the United States under the federal witness protection program.

Petitioner's co-defendants in the proceedings below included the United States of America; Hector Bellerez, Bill Waters, Pete Gruden, Jack Lawn, and Antonio Garate-Bustamante, all individual employees and agents of the U.S. Drug Enforcement Agency for whom the United States was ultimately substituted as defendant; and five unnamed Mexican nationals in the federal witness protection program. They are all nominal respondents in this matter.

Respondent Humberto Alvarez-Machain is a Mexican national.

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The opinion of the *en banc* court of appeals (Pet. App. 1a-108a) is reported at 331 F.3d 604 (9th Cir. 2003). The now-vacated panel opinion of the court of appeals (Pet. App. 109a-139a) is reported at 266 F.3d 1045 (9th Cir. 2001).

The March 18, 1999 (Pet. App. 176a-219a) and May 18, 1999 (Pet. App. 172a-175a) orders and the Sept. 9, 1999 judgment (Pet. App. 140a-171a) of the district court for the Central District of California are unreported.

JURISDICTION

The judgment of the *en banc* court of appeals was entered on June 3, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, § 8, cl. 10 of the Constitution, which provides that:

> "The Congress shall have Power ... to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations ...."

2. Ch. 20, § 9 of An Act to Establish the Judicial Courts of the United States, 1 Stat. 73 (1789), now codified as amended at 28 U.S.C. § 1350, which provides that:

> "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

STATEMENT OF THE CASE

This case raises fundamentally important questions that directly affect the ability of the President and Congress to protect the Nation's security, to combat terrorism, and to control the Nation's foreign policy. In the decision below, the Ninth Circuit, sitting *en banc*, ruled that respondent Humberto Alvarez-Machain, a Mexican national who was indicted in the United States for his alleged participation in the kidnapping, torture, and murder of a U.S. Drug Enforcement Agency ("DEA") agent in Mexico, could recover damages under the Alien Tort Act ("ATA"), 28 U.S.C. § 1350, from petitioner José Francisco Sosa, a private Mexican citizen who, at the request of the DEA, helped apprehend, detain, and transport respondent from Mexico to Texas so that he could stand trial for his alleged crimes. In sustaining petitioner's tort liability for the service he rendered to a federal law enforcement agency, the majority below concluded that petitioner's participation in an arrest and detention that lasted less than 24 hours, that resulted in no physical harm to respondent, and that was conducted in accordance with directions from senior DEA officials, violated norms of customary international law.

As the United States recently explained, imposing liability on aliens who assist the federal government in its efforts to apprehend alleged murderers and other criminals on foreign soil inescapably impairs the government's anti-terrorism efforts, which frequently depend upon the assistance of foreign allies operating outside the United States. See Brief for the United States as *Amicus Curiae* at 3, 22, *Doe I* v. *Unocal Corp.*, Nos. 00-56603, 00-56628 (9th Cir. filed May 8, 2003) (en banc) ("U.S. *Unocal* Br."), Pet App. 228a-229a, 242a-243a (citing panel decision below). Moreover, the expansive interpretation of the ATA that the Ninth Circuit and two other courts of appeals have adopted interferes with the formulation and conduct of our Nation's foreign policy. The very act of passing factual, moral and legal judgments on events that occur outside our Nation's borders, and that often

involve exercises of foreign governmental authority, is fraught with foreign policy implications that courts lack the institutional competence to assess or to appreciate fully.

The untoward consequences of the decision below are directly attributable to the *en banc* majority's failure to adhere to interpretive principles that this Court adopted to ensure that federal courts do not assume responsibilities assigned to the political branches. The Ninth Circuit improperly recognized a cause of action under a statute that is singularly devoid of the "'rights-creating' language" necessary to justify the conclusion that Congress intended to confer such a right. *Alexander* v. *Sandoval*, 532 U.S. 275, 288 (2001). And the lower court has given extraterritorial effect to a statute that contains no evidence that Congress intended the law to apply to conduct occuring outside our borders. *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991), *superseded by statute on other grounds*, *Landsgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994). Compounding these errors, the majority below gave content to the amorphous cause of action it recognized by deriving enforceable legal norms from, among other things, a human rights convention the Senate has refused to ratify, and a non-self-executing treaty that the Senate and Executive Branch have agreed may not be relied upon by individuals in domestic court proceedings.

Not surprisingly, because judicial recognition of a private cause of action to enforce evolving international legal norms is wholly divorced from any congressional intent or guidance, the three courts of appeals that have implied such a cause of action have adopted different, and bewildering, liability standards. The resulting confusion enables aliens to sue not only allies that assist the United States in efforts to combat terrorism and crime, but has led to suits by aliens against the United States itself. It also has caused a burgeoning of lawsuits against U.S. companies that conduct business in countries targeted by activists for human rights abuses.

The Court should review the interpretation of the ATA embraced by the decision below and this Court should address the profoundly important legal questions this case raises for the country's national security, foreign policy, and economic interests.

A. Respondent's Arrest and Detention

In February 1985, DEA agent Enrique Camarena-Salazar was kidnapped, tortured, and murdered in Guadalajara, Mexico. Respondent was admittedly present at the location where those crimes occurred during the time Camarena was being held. In January 1990, a federal grand jury in Los Angeles indicted respondent for participating in the crimes against Camarena, and the District Court for the Central District of California issued a warrant for his arrest.

In early 1990, the Deputy Administrator of the DEA approved a plan to have Mexican nationals apprehend respondent in Mexico and deliver him to the United States to face trial. Petitioner was one of five or six Mexicans recruited on the DEA's behalf for that effort. Petitioner knew he was acting at the DEA's request and that the DEA would pay the expenses of the operation. The DEA clearly instructed that respondent was not to be harmed in any way during his arrest and transport to the United States.

On the evening of April 2, 1990, petitioner and others entered respondent's office in Guadalajara, Mexico and took him into their custody. Respondent offered no resistance, and was not maltreated in any way. He was held at a private residence, and then at a motel, until midday on April 3, 1990, when he was taken by taxi to an airport. Respondent was flown in the company of petitioner and others to El Paso, Texas, where he was delivered to DEA and Immigration and Naturalization Service ("INS") agents. Less than 24 hours elapsed between the time of his arrest and the handover in El Paso. At no time during that detention was respondent abused, injured or otherwise harmed.

B. Legal Proceedings

Facing trial in Los Angeles, respondent moved to dismiss the indictment for lack of jurisdiction, citing violations of the extradition treaty between the United States and Mexico. Ultimately, this Court determined that respondent's arrest did not violate that treaty, and that the manner of his arrest did not deprive the trial court of jurisdiction. See *United States* v. *Alvarez-Machain*, 504 U.S. 655, 669-70 (1992). It therefore remanded the case for trial. At that trial, the district court granted respondent's motion for a judgment of acquittal.

Respondent returned to Mexico, and in 1993 filed this civil action, relying upon a number of legal theories seeking damages against the United States, and against the DEA agents and Mexican nationals involved in his 1990 arrest and transportation to the United States. The United States was subsequently substituted for all the named individual defendants except petitioner, whom the district court deemed not to be a DEA employee.

Respondent's claims against petitioner were advanced under, *inter alia*, the ATA. Originally enacted as part of the Judiciary Act of 1789, the ATA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Following various proceedings and orders limiting respondent's claims against the several defendants, the district court entered summary judgment against petitioner with respect to (i) respondent's arrest and detention, and (ii) his transborder abduction. After a bench trial, the district court rejected respondent's remaining claims for assault and battery and intentional infliction of emotional distress, limited petitioner's liability for the detention and kidnapping claims to events in Mexico only, and awarded damages of $25,000 on the latter claims.

Petitioner appealed the judgment against him, and a panel of the court of appeals affirmed his liability on the ATA claims.[1] The Ninth Circuit then granted *en banc* review. On June 3, 2003, a deeply divided *en banc* court affirmed in part and reversed in part the judgment against petitioner.

The court first re-affirmed its prior conclusion, in *Hilao* v. *Estate of Marcos (In re Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467 (9th Cir. 1994), that the ATA provides not only jurisdiction but also a cause of action for tort suits alleging violations of international law. Pet. App. 10a. According to the court, moreover, such claims are not limited to alleged violations of *jus cogens* norms of international law—*i.e.*, those peremptory norms so broadly accepted that no derogation from them is permitted. *Id.* at 12a. Rather, the court held that a plaintiff need only allege violations of "'specific, universal and obligatory'" norms of customary international law. *Id.*

The court then held that, although state-sponsored transborder abduction does not violate international law, arbitrary arrest and detention does. Pet. App. 25a-26a. In deeming respondent's arrest arbitrary, the court concluded that it was not "pursuant to law" because the warrant issued for respondent's arrest did not authorize execution outside the United States. *Id.* at 26a (internal quotation marks omitted). Although the court acknowledged that the Controlled Substances Act authorized DEA agents to effect warrantless arrests on probable cause for suspected felony violations, and that the criminal statutes respondent had been charged with violating applied extraterritorially, the court rejected the

[1] Respondent also appealed from the substitution of the United States for the DEA agents on his ATA claims; the dismissal of his claims against the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346; and the limitation of his damages claim to harm suffered in Mexico. The appeals were consolidated before the panel and in the *en banc* proceeding. The discussion above, however, focuses on the court of appeals' decisions as they affect petitioner.

government's contention that DEA agents had authority to effect or direct a warrantless arrest in Mexico. Ironically, in so ruling, the court relied on the presumption against extraterritorial application of U.S. law—a presumption it ignored in construing the ATA. The court also concluded that there was no requirement that a detention be prolonged in order to violate international law.

The *en banc* court's decision was met with two strenuous dissents. Judge O'Scannlain, writing for himself and three others, explained that "there is simply no basis in our nation's law for this bewildering result, and the implications for our national security are so ominous that I must dissent." Pet. App. 73a. He objected that "by providing relief to Alvarez on his claim of prolonged arbitrary arrest, our court has in effect restricted the authority of our political branches ... in a way that finds no basis in our law." *Id.* at 74a, 88a. Judge Gould's separate dissent objected to the adjudication of the case as a whole, on the grounds that it presents "a nonjusticiable political question requiring scrutiny of an executive branch foreign policy decision" to act against a foreign national on foreign soil, with consequences for U.S. foreign relations. *Id.* at 97a.

REASONS FOR GRANTING THE PETITION

In the decision below, the Ninth Circuit decided at least three questions of law relating to the ATA that require this Court's review. First, the court re-affirmed its prior holding that the ATA is not solely a jurisdictional grant, but also provides a cause of action for tort suits alleging violations of international law or U.S. treaties. Second, the court held that ATA suits against private parties are not limited to violations of non-derogable, *jus cogens* international law norms—an issue on which the courts of appeals are divided. Third, the court held that an arbitrary arrest and detention of *any* duration is potentially actionable under the ATA. All three holdings are of great importance, as they harm the national

security, foreign policy, and economic interests of the United States.

I. THE ATA IS A GRANT OF JURISDICTION ONLY, AND CREATES NO CAUSE OF ACTION.

By its plain terms, the ATA does nothing more than confer jurisdiction on the district courts over particular types of civil actions. Nevertheless, since 1980, three courts of appeals, including the court below, have ruled that the ATA impliedly creates a cause of action that aliens can use to enforce evolving norms of international law, including norms that the political branches have chosen not to make binding. Although there is no square conflict among the lower courts over whether the ATA creates a cause of action, the United States and several judges of the D.C. Circuit have cogently explained that implying a cause of action under the ATA violates bedrock interpretive rules designed to ensure that courts do not usurp or interfere with duties assigned to the political branches. And the violation of those rules in this case demonstrates some of the significant evils that can arise when courts over-step their bounds: The decision below undermines ongoing anti-terrorism and anti-crime efforts abroad, and interferes with the conduct of foreign affairs. This Court should grant the petition to resolve the fundamentally important issue presented by this case.

A. The Second, Eleventh, And Ninth Circuits Have Implied A Cause Of Action Under The ATA With Little If Any Analysis Of Congress's Intent.

The ATA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The ATA was adopted, in substantially its current form, as part of the Judiciary Act of 1789. The statute was essentially ignored for 200 years following its enactment, serving as the basis for jurisdiction in only two cases between 1789 and 1975. See

IIT v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (citing *Bolchos* v. *Darrel*, 3 Fed. Cas. 810 (D.S.C. 1795) and *Abdul-Rahman Omar Adra* v. *Clift*, 195 F. Supp. 857 (D. Md. 1961)).

In 1980, however, the Second Circuit held in *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), that the ATA could be used by aliens to sue for violations of international law. In its decision, the Second Circuit did not directly address whether the ATA created a cause of action. Instead, it assumed that the law of nations could be "'ascertained and administered'" as part of the federal common law. See *id.* at 885-87.

Several years later, in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (per curiam), two judges of the D.C. Circuit sharply criticized the *Filartiga* decision. Judge Bork explained that the ATA was merely a grant of jurisdiction that did not provide a cause of action, and that separation-of-powers principles precluded implication of such a right. *Id.* at 799-801 (Bork, J., concurring). Implying a cause of action, he warned, "would raise substantial problems of judicial interference with nonjudicial functions, such as the conduct of foreign relations," *id.* at 804, and would force courts seeking to define an implied action without any congressional guidance to "act in the dark, and hence to do many things that, it is virtually certain, Congress did not intend." *Id.* at 815. Judge Robb likewise argued that *Filartiga* was "fundamentally at odds with the reality of the international structure and with the role of the United States courts within that structure," and that "intervention by courts into international affairs may very well rebound to the decisive disadvantage of the nation." *Id.* at 826 n.5 (Robb, J., concurring). Although Judge Edwards agreed with the *Filartiga* decision, he believed that the proper construction of the ATA was "an area of the law that cries out for clarification by the Supreme Court." *Id.* at 775 (Edwards, J., concurring).

This Court, however, declined to provide clarification at that time, see *Tel-Oren ex rel. Tel-Oren* v. *Libyan Arab Republic*, 470 U.S. 1003 (1985) (No. 83-2052) (denying petition for certiorari), and ten years later the Ninth Circuit expressly held for the first time that the ATA itself creates a cause of action. The court misread *Filartiga* as having so held[2] and simply followed the Second Circuit's supposed conclusion without independently analyzing the issue. See *Hilao* v. *Estate of Marcos (In re Ferdinand Marcos, Human Rights Litig.)*, 25 F.3d 1467 (9th Cir. 1994). Two years later, the Eleventh Circuit held that the ATA "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira* v. *Negewo*, 72 F.3d 844, 848 (11th Cir. 1996). In so ruling, the Eleventh Circuit relied principally on the Ninth Circuit's reasoning in *Hilao*, as well as language from the House Report accompanying the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73, which suggested that the ATA provides a cause of action. See 72 F.3d at 847-48 (citing H.R. Rep. No. 102-367, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84, 86).

Just months before the decision below issued, yet another concurring opinion in the D.C. Circuit offered a detailed critique of *Filartiga*'s analytical flaws. Addressing ATA claims brought by detainees at the Guantanamo Naval Base against the United States itself, Judge Randolph explained that recent scholarship cast grave doubt on any assumption that the First Congress intended to authorize a cause of action by aliens founded on customary international law. *Al Odah* v. *United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003)

[2] On the remand in *Filartiga* itself, the district court recognized that the Second Circuit had not addressed the issue, *see Filartiga* v. *Pena-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984) ("We must now face the issue left open by the Court of Appeals, namely, the nature of the 'action' over which [the ATA] affords jurisdiction"), as Judge Bork did in *Tel-Oren*. *See* 726 F.2d at 819 (Bork, J., concurring) (*Filartiga* "did not address the issue of the existence of a cause of action" under the ATA).

(Randolph, J., concurring). He also noted that the practice of having federal courts "discover" such law "among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Id.* He likewise noted that the legislative history of the TVPA could not ratify *Filartiga*, and could shed no light on the intent the Congress that enacted the ATA in 1789. *Id.* at 1146.

In the course of the proceedings below, the Ninth Circuit twice addressed, and re-affirmed, its conclusion that the ATA provides both jurisdiction and a cause of action. First, on appeal of the partial dismissal of respondent's complaint, the Ninth Circuit rejected the argument that the ATA is simply a grant of jurisdiction. *Alvarez-Machain* v. *United States*, 107 F.3d 696, 703 (9th Cir. 1996). It concluded that the legislative history of the TVPA buttressed its prior conclusion, in *Hilao*, that the ATA provides a cause of action. *Id.* Second, the *en banc* majority *sua sponte* expressly re-affirmed its holding in *Hilao*. Pet. App. 10a. Neither the panel nor the *en banc* majority, however, addressed any of the criticisms that members of the D.C. Circuit have leveled at the Ninth Circuit's implication of a cause of action under the ATA, nor any of the criticisms advanced by scholars.

Because the issue presented was both pressed and passed on below, and because, as petitioner shows in detail below, "the availability of a right of action" under the ATA is an issue of great "importance to the administration of federal law," it is properly presented in this case. *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); see also *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991).[3]

[3] In addition, because the petition raises two other issues independently worthy of this Court's review, and because the issue of whether the ATA provides a cause of action is logically subsumed within both of these

B. Implying A Cause Of Action Under The ATA Violates Several Interpretive Rules Designed To Prevent Judicial Interference With The Political Branches' Conduct Of Foreign Affairs.

As members of the D.C. Circuit and, more recently, the United States itself have explained, implication of a right of action under the ATA is flatly inconsistent with several interpretive rules designed to prevent the very type of judicial interference with political branch functions that the decision below indisputably permits.

First, implying a cause of action violates this Court's admonition that it is for Congress, not the courts, to create private rights of action. *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). As the United States has explained, the ATA "does not purport to create any particular statutory *rights*, much less rights that in turn could be interpreted to confer a private right of action for money damages." U.S. *Unocal* Br. at 13, Pet. App. 236a. Indeed, far from employing the type of "'rights-creating' language so critical" to implication of a cause of action, *Alexander*, 532 U.S. at 288, the ATA is phrased in strictly jurisdictional terms. It grants district courts "original *jurisdiction* of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added).

The strictly jurisdictional nature of the Act is confirmed by its original language and its placement in the Judiciary Act of 1789. As originally enacted, the statute granted "the district courts .... *cognizance*, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (emphasis added). The Judiciary Act

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issues, the issue is properly presented. *See Missouri* v. *Jenkins*, 515 U.S. 70, 84-85 (1995); *Procunier* v. *Naverette*, 434 U.S. 555, 560 n.6 (1978).

of 1789 established the federal courts themselves and conferred on them specific grants of jurisdiction. The original language of the ATA appeared as a clause in Section 9 of the 1789 Judiciary Act, next to provisions granting the new federal courts "cognizance," or jurisdiction, over crimes on the high seas, actions in admiralty, and suits against consuls. *Id.* Both the familiar interpretive principle that terms and phrases are known by the linguistic company they keep, see *e.g.*, *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995); *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 576 (1995), and the elemental task the First Congress was undertaking—creating a federal judiciary from wholecloth—confirm that, like the provisions surrounding it, the ATA was simply a grant of jurisdiction.

Although the ATA was not accompanied by any legislative history, historical research confirms the statute's limited function. In particular, scholars have uncovered evidence indicating that the ATA was passed in response to two high profile cases involving assaults upon foreign ambassadors on domestic soil. See William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491-94 (1986). Because, at the time, a "denial of justice" to one's citizens abroad was a justification for a war of reprisal, it was necessary to ensure that the new federal courts had jurisdiction over a claim brought by an ambassador, or other alien, seeking redress for a violation of any principles of the "law of nations" incorporated into any federal statutes or "treaties of the United States."[4]

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[4] Another scholar has marshalled evidence indicating that the ATA was passed to ensure that the grant of exclusive admiralty jurisdiction to the new federal courts did not deprive State courts of jurisdiction over cases in which an alien sued not for the return of a prize ship, but for reparations for damages caused by the ship's seizure. *See* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445 (1995). Even under this competing view, of course, the ATA remains a purely jurisdictional grant of authority.

In short, the ATA is not only utterly devoid of any "'rights-creating' language," it is a type of jurisdiction-vesting provision that this Court has expressly held does *not* create a cause of action. See *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951).

Moreover, the violation of separation-of-powers principles that results from implication of a cause of action under the ATA is greatly compounded by the fact that, in order to give content to that cause of action, the court below usurped the power and responsibility of the political branches to decide which norms of international law should be binding. In concluding that arbitrary arrest and detention is a violation of customary international law, the lower court relied on, among other things, the American Convention on Human Rights, the International Covenant on Civil and Political Rights ("ICCPR"), and the Universal Declaration of Human Rights. Pet. App. 25a-26a & n.17. The U.S. Senate, however, has *refused to ratify* the American Convention on Human Rights. And while it has ratified the ICCPR, the Senate and the Executive Branch have expressly agreed that this treaty is not self-executing and may not be relied upon by individuals in domestic court proceedings. See S. Exec. Rep. No. 102-23, at 9, 19, 23 (1992); 138 Cong. Rec. S4781, S4783-84 (daily ed. Apr. 2, 1992). Similarly, the Universal Declaration of Human Rights is a *non-binding* resolution of the United Nations General Assembly. By purporting to derive "'specific, universal and obligatory'" norms from these documents, Pet. App. 12a, the lower court plainly usurped the prerogative of the political branches to decide whether certain norms of international law should be binding and enforceable in U.S. courts.

Second, implication of a cause of action under the ATA violates the principle that domestic laws are not to be given extraterritorial effect unless Congress has expressed such an intent in the statute itself. See, *e.g.*, *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991). That venerable principle,

which is as old as the ATA itself, is designed "to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at 248. It is particularly inconceivable that the representatives of a new and still fragile Nation, whose first President would soon famously warn against foreign entanglements, President George Washington, Farewell Address (Sept. 19, 1796), chose, in one of their first legislative acts, to pass a law authorizing the new federal judiciary to pass factual, moral and legal judgments on conduct occurring entirely outside the Nation's borders in disputes between non-U.S. citizens. That such a judicial role was unfathomable to the founding generation is made clear by John Marshall's oft-quoted statement, made ten years after adoption of the ATA, that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 6 Annals of Cong. 613 (1800).

The Ninth Circuit's unwillingness to abide by these interpretive precepts thus conflicts with the clear directives of this Court and causes deeply disturbing foreign policy consequences that warrant this Court's attention.

C. An Implied Cause Of Action Under The ATA Interferes With The Political Branches' Ability To Conduct Foreign Affairs.

The majority below recognized that the case before it "implicates our country's relations with Mexico, ... an important ally and trading partner," and that it is not the province of the courts "to address the policy and diplomatic issues associated with transborder kidnapping." Pet. App. 3a. The majority mistakenly believed, however, that by deciding the supposedly "narrow question" of "whether [respondent] has a remedy at law under the ATCA," *id.*, it could somehow side-step "the legal quagmire" surrounding the question of terrorist-apprehension, as well as a host of other thorny foreign relations problems. *Id.* But implication of a cause of action under the ATA is by no means a "narrow question."

To the contrary, the lower court's resolution of that issue inescapably interferes with critical aspects of our Nation's foreign relations. And that interference necessitates review by this Court.

1. Interference with Efforts to Promote and Protect National Security.

As Judge O'Scannlain explained, by holding "that a foreign-national criminal who was apprehended abroad pursuant to a legally valid indictment is entitled to sue" aliens who assist federal agencies in such captures, the decision below "le[aves] the door open for the objects of our international war on terrorism to do the same." Pet. App. 72a (O'Scannlain, J., dissenting); see also *id.* at 104a-105a, 107a n.7 (Gould, J., dissenting). The assistance of foreign agents operating on foreign soil is vital to the Nation's efforts to fight both international terrorism and international crime. For example, the United States might request that a Middle East ally detain a suspected terrorist for questioning. Under the decision below, however, the U.S. officials who convey the request, the foreign officials who execute it, and any cooperating individuals who participate in the brief detention, expose themselves to the burdens of defending their actions in distant courts and to liability for money damages.

These risks are starkly illustrated by this case. Acting at the direction of senior DEA officials who had obtained a valid indictment against respondent and a valid warrant for his arrest, petitioner was ultimately held liable based on a highly technical interpretation of the statutory authority of DEA agents to engage in extraterritorial enforcement activities. This imposition of liability can only deter other would-be assistants in the wars on terrorism and international crime. Indeed, by demonstrating that even the participation and assurances of senior officials is no guarantee against civil liability, the decision below will inevitably make it harder for law enforcement and intelligence agents to persuade foreigners to aid this country.

In the complete absence of any evidence that Congress intended to authorize such interference with national security efforts, implication of such a cause of action does great violence to core notions of separation of powers. As this Court has explained, decisions affecting national security

> are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which have long been held to belong in the domain of political power not subject to judicial intrusion.

Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Accordingly, any decision to permit aliens to bring actions in U.S. courts of the type respondent successfully prosecuted below should be made by "those directly responsible to the people whose welfare [such actions] advance or imperil," not by unelected judges with no expertise in foreign relations or counterterrorism efforts. This Court should grant the petition to eliminate the "ominous" "implications for our national security" caused by the decision below. Pet. App. 73a (O'Scannlain, J., dissenting); *id.* at 104a n.5 (Gould, J., dissenting).

2. Interference with the Conduct of Foreign Affairs.

Although interference with anti-terrorism efforts is the most stark consequence of the lower court's implication of a cause of action, it is by no means the only significant impediment to the conduct of foreign relations that the decision below entails. Suits brought by aliens in U.S. courts against foreign governments, their agents or their citizens inevitably create international frictions. At a minimum, these frictions can complicate diplomatic efforts and relations. And in some

cases, they can affirmatively undermine our Nation's foreign policy objectives.

In two recent cases brought under the ATA, senior officials of foreign governments have expressed anger and resentment at the very existence of these suits. See, *e.g.*, Letter from Soemadi D.M. Brotodiningrat, Ambassador of Indonesia to the United States, to Richard Armitage, Deputy Secretary, U.S. Department of State (July 15, 2002), *filed in Doe I* v. *ExxonMobil Corp.*, No. 01cv1357 (D.D.C. document filed Aug. 1, 2002) (expressing concern regarding ATA litigation); South African President Thabo Mbeki, Statement to the National Houses of Parliament and the Nation (Apr. 15, 2003), *available at* http://www.anc.org.za/ancdocs/history/mbeki/2003/tm0415.html ("[W]e consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation."). These reactions, in turn, cause diplomatic headaches, by forcing the Executive Branch either to oppose suits on foreign policy and immunity grounds and face the wrath of public opinion, or to stay silent and damage its position with foreign nations.[5]

In some instances, moreover, such suits can affirmatively impair pursuit of U.S. foreign policy goals. Last year, for example, the Department of State's Legal Adviser advised a district judge that adjudication of an ATA case would "risk a potentially serious adverse impact on significant interests of the United States." Letter of William H. Taft, IV, Legal Adviser, Department of State, to Hon. Louis F. Oberdorfer 1 (July 29, 2002), *filed in Doe I* v. *ExxonMobil Corp.*, No.

[5] Indeed, for similar political reasons, the Belgian Parliament recently scaled back a law similar to the ATA in order to prevent political and diplomatic conflicts. *See Six NGOs urge EU to consider applying universal jurisdiction*, Agence Eur., Aug. 5, 2003, *available at* 2003 WL 58352344.

01cv1357 (D.D.C. document filed Aug. 1, 2002), Pet. App. 250a. Explaining that "the government and people of Indonesia react most negatively to any perceived intrusion into areas of Indonesian sovereignty," the Legal Adviser opined that adjudication of the suit "could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform." *Id.* at 2-3, Pet. App. 251a-252a.

Beyond these obvious harms, the Ninth Circuit's practice of looking to non-binding U.S. treaties and international agreements to give content to the cause of action it has implied impermissibly complicates and interferes with the exercise of the Executive Branch foreign affairs powers. For any number of foreign relations purposes, the United States may desire to, and routinely does, enter into non-self-executing treaties without simultaneously creating a private cause of action for foreign litigants. Yet the practice of looking to such documents in order to give content to an implied cause of action forces Executive officials to weigh the additional "possibility of tort lawsuits by foreign nationals seeking punitive damages in their own nation's courts." Pet. App. 103a (Gould, J., dissenting).

This same practice interferes with the ability of the political branches to help shape the governing standards of customary international law. Because those standards are derived from the "general and consistent practice of states followed by them from a sense of legal obligation," Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987) ("Restatement"), Congress and the President can, through acquiescence or non-acquiescence, influence whether a particular norm achieves the level of general assent necessary to become binding as customary international law. But, by purporting to derive such standards from sources such as non-binding United Nations General Assembly resolutions and the writings of law professors, the Ninth Circuit both

dilutes and usurps the constitutional authority of the political branches to shape these norms. See *United States* v. *Yousef*, 327 F.3d 56, 102 (2d Cir. 2003) (notion that "professors of international law enjoy a special competence to prescribe the nature of customary international law wholly unmoored from legitimating territorial or national responsibilities, the interests and practices of States, or (in countries such as ours) the processes of democratic consent—may not be unique, but it is certainly without merit") (footnote omitted), *petition for cert. filed*, No. 03-5976 (U.S. Aug. 16, 2003); *Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring) (reliance on nongovernmental influences "is anti-democratic and at odds with principles of separation of powers").

Finally, the Ninth Circuit's practice harms U.S. business interests operating abroad, thereby undermining the ability of the political branches to use economic leverage to advance foreign policy goals. As this Court has recognized, the President can use the ability to permit or prohibit U.S. investment abroad to induce cooperation from repressive or hostile regimes. See generally *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 375-76 (2000). Recently, however, plaintiffs have begun to use the ATA to seek to hold multinational companies doing business in countries where human rights abuses occur liable for the state actors' wrongdoing. See, *e.g.*, *Ntsebeza* v. *Citigroup Inc.*, 1:02cv4712 (S.D.N.Y. filed June 19, 2002) (claims against corporations conducting business in South Africa during apartheid era). U.S. businesses operating overseas thus face new, and undefined liability based on evolving norms of customary international law. See Jenna Greene, *Gathering Storm*, Legal Times, July 21, 2003, at 1 ("'[i]f you're a business and you haven't yet been sued under this law, don't worry, you will be'"). This risk not only places U.S. businesses at a competitive disadvantage vis-à-vis foreign competitors who operate exclusively overseas free from the risk of suit in U.S. courts, it could chill or curtail U.S.

investment in the very countries where the promise of such investment, or the threat of prohibiting it, can be a powerful diplomatic tool.

Again, in the absence of clear evidence that Congress intended such results, it is improper to imply a cause of action with such untoward consequences for the conduct of the Nation's foreign policy. The Ninth Circuit's contrary judgment warrants this Court's plenary review.

* * * *

The foregoing harms to the Nation's security, to the conduct of the Nation's foreign affairs, and to fundamental separation-of-power principles are significant and immediate. Nearly 20 years ago, Judge Edwards argued that the proper construction of the ATA was an issue "that cries out for clarification by the Supreme Court." *Tel-Oren*, 726 F.2d at 775. The intervening two decades have proven true Judge Bork's prediction that, in the absence of such clarification, courts would "do many things that, it is virtually certain, Congress did not intend." *Id.* at 815. Further litigation in the lower courts will not bring any needed clarity; indeed, it is unlikely that ATA cases will even be litigated in most circuits, and plaintiffs have every incentive to bring future actions in the three circuits that have implied causes of action. Accordingly, the Court should grant the petition to resolve the fundamentally important question of whether the ATA is simply a grant of jursidiction from which no cause of action can be implied.

II. THE COURTS OF APPEALS ARE DIVIDED ON THE PROPER REACH OF THE ATA.

In the decision below, the Ninth Circuit adopted a standard of liability for the cause of action it has implied that squarely conflicts with the liability standard employed by the Second Circuit. The Ninth Circuit's standard, moreover, is an indeterminate one that is judicially unmanageable and will only spawn confusion and uncertainty in the lower courts.

Accordingly, even if a cause of action can properly be implied under the ATA, this Court should review the decision below to resolve the conflict among the courts of appeals as to the proper standard of liability in such actions.

A. The Ninth Circuit Has Adopted A Standard Of Liability Under The ATA That Squarely Conflicts With The Second Circuit's Standard.

In the lower courts, litigants have advanced two distinct standards of liability for actions brought under the ATA. The Second Circuit permits imposition of liability against private individuals only for violations of *jus cogens* norms. In the decision below, however, the Ninth Circuit rejected that approach in favor of an indeterminate category consisting of violations of some, though not necessarily all, norms of customary international law.

Jus cogens norms are offenses that are universally condemned and prohibited for all nations. States are bound by these norms even if they object to or dissent from them, and cannot form contracts or agreements that would violate them. Thus, *jus cogens* norms are rules of international law which, once established, cannot be set aside by treaty or practice. See, *e.g.*, Ian Brownlie, *Principles of Public International Law* 514 (4th ed. 1990); *Siderman de Blake* v. *Argentina*, 965 F.2d 699, 715 (9th Cir. 1992); *Committee of U.S. Citizens Living in Nicar.* v. *Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); *Yousef*, 327 F.3d at 94-95. The international law offenses most consistently listed in the *jus cogens* category include: aggressive war/use of force; genocide; systematic racial discrimination; crimes against humanity; slavery or slave trade; murder or causing the disappearance of individuals; summary execution; torture or other cruel, inhuman or degrading treatment; and piracy. Brownlie, *supra*, at 513; Restatement § 102 n.6 and § 702 cmt. n; *U.S. Citizens Living in Nicar.*, 859 F.2d at 941-42.

By contrast, "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement § 102(2); *U.S. Citizens Living in Nicar.*, 859 F.2d at 940. A rule must achieve general assent before it becomes binding on nations as customary international law. In other words, customary international law is made up of the offenses that the international community, through practice, has prohibited. It is to be ascertained "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law." *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

In *Kadic* v. *Karadzic*, 70 F.3d 232, 239-40, 244 (2d Cir. 1995), the Second Circuit first held that private parties can be held liable for certain violations of international law, but limited its holding to *jus cogens* violations. Specifically, it listed only piracy, genocide and war crimes—what it called violations of "universal concern"—as offenses for which a private person may be held liable under the ATA. These offenses of universal concern are, of course, core *jus cogens* violations.[6] *Id.* at 240.[7]

Second Circuit practice and precedents subsequent to *Kadic* confirm that court's rule that private persons are only liable under the ATA if they violate *jus cogens* norms. For

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[6] Although the *Kadic* court did not specifically use the term "*jus cogens*," its holding clearly is limited to those norms. The actionable offenses identified in *Kadic* are those most consistently listed as violations of *jus cogens* norms. *See, e.g.*, Brownlie, *supra*, at 513; Restatement § 102 n.6, § 702 cmt. n and § 404 n.1; *U. S. Citizens Living in Nicar.*, 859 F.2d at 941-42. In addition, the court emphasized that its holding was limited only to the small number of actions of "'universal concern'" listed in § 404 of the Restatement. *Kadic*, 70 F.3d at 240.

[7] The *Kadic* court opined by contrast that two other offenses of universal concern, torture and summary execution, would be actionable under the ATA only when committed by state officials or under color of state authority. *Kadic*, 70 F.3d at 243.

example, in *Bigio* v. *Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000), the Second Circuit again emphasized that private persons are liable under the ATA only if their conduct falls within the handful of international law violations that are of "'universal concern.'" *Id.* at 447-48. In the Second Circuit's view, such offenses would include only "'piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism'"—acts that are consistently identified as *jus cogens* violations. *Id.* at 448 (quoting Restatement § 404). The *Bigio* court held that the discriminatory expropriation of property at issue in that case, "[h]owever reprehensible," was not an act of universal concern listed in § 404 of the Restatement. *Id.* The district courts of the Second Circuit have recognized and followed this rule. See, *e.g.*, *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 244 F.Supp.2d 289, 312-13 (S.D.N.Y. 2003).[8]

In the decision below, however, the Ninth Circuit rejected this approach, stating that "the fact that a violation of this subcategory of international norms is *sufficient* to warrant an actionable claim under the ATCA does not render it *necessary*." Pet. App. 12a. Although it adhered to its statements in prior cases that only violations of "specific, universal, and obligatory" international norms are actionable

[8] Although the Fifth Circuit has not decided whether the ATA provides a cause of action, it has indicated that only violations of *jus cogens* norms could be actionable under the ATA. *See Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (ATA "'applies only to shockingly egregious violations of universally recognized principles of international law'") (quoting *Zapata* v. *Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam)). *See also Tel-Oren*, 726 F.2d at 781 (Edwards, J. concurring) ("a handful of heinous actions—each of which violates definable, universal and obligatory norms," are actionable under the ATA); *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (the ATA "may conceivably" cover certain acts such as piracy and assaults upon ambassadors, but does not reach private parties who may have supported the Contra forces fighting against the government of Nicaragua).

under the ATA—terminology that appears to echo the classic language of *jus cogens* jurisprudence—the court below rejected a *jus cogens* limitation on the ground that "[t]he notion of *jus cogens* norms was not part of the legal landscape when Congress enacted the ATCA in 1789." *Id.* at 13a. The Ninth Circuit thus held that respondent had a remedy under the ATA for his arbitrary arrest and detention, notwithstanding that arbitrary arrest and detention does not violate *jus cogens* unless the detention is prolonged.[9] The conflict between the liability standards employed in the Second and Ninth Circuits could not be clearer.

B. ATA Liability For Violations Of Customary International Law Is Judicially Unmanageable.

Stripped of any *jus cogens* limitation, the Ninth Circuit's approach to identifying actionable offenses is vague, and relies on terminology that fits imperfectly in the international law lexicon. This liability standard is judicially unmanageable, and will result in significant uncertainty for litigants.

In light of the foreign policy implications of holding foreign citizens and foreign government officials liable for violations of customary international law, it is critically important that, if courts impose such liability at all, they undertake an exacting inquiry to identify the relevant binding norms. As the Fifth Circuit has observed, however, the "question of defining 'the law of nations' is a confusing one which is hotly debated, chiefly among academics." *Carmichael* v. *United Techs. Corp.*, 835 F.2d 109, 113 (5th Cir. 1988). Because these rules are evolving and state practice may be inconsistent, it may not always be possible to ascertain (i) whether there is a general recognition among countries that specific acts are prohibited and (ii) whether

[9] *See* Restatement § 702 cmt. n; *Tel-Oren*, 726 F.2d at 781 (Edwards, J. concurring). *But see* Brownlie, *supra*, at 513; *Siderman de Blake*, 965 F.2d at 715-17.

there actually is a corresponding practice by governments demonstrating compliance with the prohibition.[10]

Indeed, a court must be sure that rules are settled as recognized through the general assent of civilized nations. *The Paquete Habana*, 175 U.S. 677, 694 (1900). It is not enough to consult the writings of international scholars, or hortatory declarations and treaty preambles, to divine whether a given ideal or aspiration is in fact part of customary international *law*. In fact, these sources are secondary at best. *Yousef*, 327 F.3d at 99-103; Anthony D'Amato, *Trashing Customary International Law*, 81 Am. J. Int'l L. 101, 102 (1987). Instead, a court must start with, and thoroughly examine, the actual practices of states, taking into account not only past practice, but also whether practices have changed over time to take account of new state interests. *Yousef*, 327 F.3d at 99-103; D'Amato, *supra*, at 104.[11] Likewise, a court must distinguish between practices *accepted as law*, and uniform practices or usages that are continued merely out of habit or politeness. Brownlie, *supra*, at 5, 7-9; Restatement § 102(2); *Yousef*, 327 F.3d at 91 n.24, 92.

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[10] For example, the U.N.'s "Standard Minimum Rules for the Treatment of Prisoners" sets forth one standard as to how prisoners should be treated. However, as numerous human rights reports show, this standard is not reflected in state "practice," and prisoners are treated far more harshly around the world. *See, e.g.*, Human Rights Watch, *World Report 2002: Prisons* (2002), *available at* http://www.hrw.org/wr2k2/prisons.html.

[11] The Second Circuit in *Yousef* and Judge O'Scannlain in his dissent here have both suggested that if the United States has not embraced or abided by an international norm in practice, it cannot be deemed "universal," and thus is not properly considered a *bona fide* norm of customary international law. *See Yousef*, 327 F.3d at 92 n.25; Pet. App. 76a. Other courts, however, have perceived no such limitation. *See, e.g.*, Pet. App. 87 n.15; *cf. Doe I* v. *Unocal Corp.*, Nos. 00-56603 et al., 2002 WL 31063976, at *12-*13 (9th Cir. Sept. 18, 2002) (adopting liability standard developed by international tribunals in reliance on, *inter alia*, Statute of International Criminal Court, which United States has refused to join), *vacated by* 2003 WL 359787 (9th Cir. Feb. 14, 2003) (granting rehearing en banc).; *see also* discussion *infra* at Part III.

These difficulties raise serious questions as to whether courts even possess the competence to determine whether an alleged norm of customary international law actually exists. The uncertainty engendered by such an exercise will foster the already burgeoning efforts of well-meaning plaintiffs to fashion customary international law claims against U.S. businesses that operate in countries with poor human rights track records, to the ultimate detriment of U.S. economic interests.

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In short, review by this Court is necessary to reconcile the split of authority among the courts of appeal. Absent such clarification, ATA plaintiffs will surely begin to seek out the most hospitable fora—the courts in the Ninth Circuit—in which to advance their ever-multiplying claims under that court's vague and indeterminate liability standard.

III. RESPONDENT'S ARREST AND DETENTION DID NOT VIOLATE CUSTOMARY INTERNATIONAL LAW.

Finally, this Court should grant the petition and review the lower court's determination that petitioner's arrest and detention of respondent violated customary international law. That holding, which rests on the lower court's erroneous resolution of two legal issues, seriously undermines the federal government's anti-crime and anti-terrorism efforts. Accordingly, that holding independently warrants plenary review.

A. Respondent's Arrest Was Not Arbitrary.

The lower court's determination that respondent's arrest was arbitrary hinged on its conclusion that DEA agents lack authority to conduct extraterritorial enforcement efforts. As the Ninth Circuit itself recognized, the statutes respondent was charged with violating applied extraterritorially, and DEA agents have statutory authority to make warrantless

arrests on probable cause for suspected felony violations. Pet. App. 35a-36a (citing 21 U.S.C. § 878(a)(3)). Thus, despite the fact that the statute authorizes warrantless arrests for suspected felony violations that can occur outside U.S. borders, the lower court concluded that the presumption against extraterritorial application foreclosed the exercise of this arrest power in Mexico.

In *United States* v. *Bowman*, 260 U.S. 94 (1922), however, this Court held that the requirement that Congress disclose a statute's extraterritorial application in the statutory text itself "should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated." *Id.* at 98. That same principle demonstrates the propriety of the arrest at issue in this case. Just as the government's authority to forbid the kidnap, torture and murder of DEA agents does not logically depend on the locus of those acts, so too authorization to make a warrantless arrest based on probable cause for suspected violation of those prohibitions is not logically restricted to the government's jurisdiction over the locus of the acts.

Nor does an authorization to conduct extraterritorial enforcement of criminal laws that themselves have extraterritorial application "eviscerate," Pet. App. 37a, the presumption against such application, or suggest that Congress has "turned a blind eye to the interests of equal sovereigns and the potential violations of international law." *Id.* at 41a. Unlike the ATA, which, under the Ninth Circuit's view, can be enforced by private persons, DEA's arrest authority is under the control, ultimately, of the President. Because the President is responsible both for the conduct of the Nation's foreign affairs and its law enforcement activities, Congress can reasonably expect that he will balance these

interests appropriately, and will not permit authorizations to perform arrests on foreign soil to damage foreign relations.

B. Respondent's Arrest Was Not Prolonged.

Finally, the lower court erred in concluding that an arrest need not be "prolonged" in order to violate customary international law. As noted above, in reaching this conclusion, the lower court improperly relied on a non-binding resolution of the United Nations General Assembly, an unratified treaty, and a non-self-executing treaty. See *supra* at 14. For the numerous reasons discussed above, these documents cannot serve as evidence that the United States has, through its political branches, bound itself to the standards identified in these instruments. Indeed, the lower court's contrary conclusion is a plainly impermissible usurpation of authority assigned to the executive and legislative branches.

Moreover, as the lower court itself acknowledged, the Restatement refers to "'*prolonged* arbitrary detention'" as a customary law violation. Pet. App. 28a (citing Restatement § 702) (emphasis added). The lower court's citation to a single comment to the Restatement that "implies" that a detention need not be prolonged to constitute such a violation, *id.*, simply underscores the fundamental analytical flaws in the opinion discussed above. The comment states that a "single, brief, arbitrary detention by an official of a state party to one of the principal international agreements *might* violate *that agreement*." Restatement § 702 cmt. h (emphasis added). The *possible* violation of an international agreement hardly establishes the actual practices of nations with respect to detentions. And in all events, the agreements the lower court identified are not binding or self-executing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 99-56762, 99-56880

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; HECTOR BERELLEZ; BILL WATERS; PETE GRUDEN; JACK LAWN; ANTONIO GARATE-BUSTAMANTE; FRANCISCO SOSA, and five unnamed Mexican nationals currently in the federal witness protection program,
Defendants-Appellees,

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee,

v.

FRANCISCO SOSA, and five unnamed Mexican nationals currently in the federal witness protection program,
Defendant Appellant.

Argued and Submitted June 11, 2001.
Panel Opinion Filed Sept. 11, 2001.
Rehearing En Banc Granted March 20, 2002.
Argued and Submitted En Banc June 18, 2002.
Filed June 3, 2003.

Appeal from the United States District Court for the Central District of California, Stephen V. Wilson, District Judge, Presiding. D.C. No. CV-93-04072- SVW-06.

Before SCHROEDER, Chief Judge, GOODWIN, O'SCANNLAIN, RYMER, KLEINFELD, THOMAS, McKEOWN, FISHER, GOULD, PAEZ and TALLMAN, Circuit Judges.

Opinion by Judge McKEOWN; Concurrence by Judge FISHER; Dissent by Judge O'SCANNLAIN; Dissent by Judge GOULD.

OPINION McKEOWN, Circuit Judge.

We must decide whether the forcible, transborder abduction of a Mexican national, Humberto Alvarez-Machain ("Alvarez"), by Mexican civilians at the behest of the Drug Enforcement Administration (the "DEA") gives rise to a civil claim under United States law. In an earlier, related proceeding, the Supreme Court acknowledged, without deciding, that Alvarez "may be correct" in asserting that his abduction was "shocking" and "in violation of general international law principles." *United States v. Alvarez-Machain,* 504 U.S. 655, 669, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992). We now address the question left unanswered—whether there was a "violation of the law of nations," a predicate to federal court jurisdiction under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350. We also consider whether the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b)(1), 2671-2680, provides a remedy for this cross-border abduction.

In 1990, Mexican citizens acting on behalf of the DEA kidnapped Alvarez from his office in Mexico for his alleged involvement in the kidnapping and murder of an American DEA agent in Mexico. The arrest of Alvarez took place without an extradition request by the United States, without the involvement of the Mexican judiciary or law enforcement, and under protest by Mexico. Alvarez was brought to the United States, stood trial on criminal charges, and was acquitted. He then sued his former captors, the United States,

and the DEA agents, asserting a panoply of common law and constitutional torts arising from his abduction.

This case, which has been litigated in one form or another for more than a decade, involves important issues of international law and sovereignty. It also implicates our country's relations with Mexico, our neighbor to the South and an important ally and trading partner. The questions it raises, particularly with regard to the Executive's power to carry out law enforcement operations abroad, perhaps resonate to a broader audience today than when the case began. In the midst of contemporary anxiety about the struggle against global terrorism, there is a natural concern about the reach and limitations of our political branches in bringing international criminals to justice.

But we need not delve into the legal quagmire of apprehending terrorists or even resolve many of the complex issues spawned by this international abduction dispute. Nor is it within our province to address the policy and diplomatic issues associated with transborder kidnapping. Rather, this appeal presents only the narrow question whether Alvarez has a remedy at law under the ATCA and the FTCA for a violation of the "law of nations."

More precisely, we must determine the statutory authority of a single federal agency-the DEA-to make a warrantless arrest outside the borders of the United States and, if the agency lacks that authority, whether Alvarez has a remedy at law under the ATCA or the FTCA. After a careful review of the relevant statutes, we conclude that the DEA had no authority to effect Alvarez's arrest and detention in Mexico, and that he may seek relief in federal court.

Whatever the contours of the powers of the political branches during wartime or in matters of national security, the exercise of those powers in the combat against terrorism are not implicated in our analysis. Our holding today, that

Alvarez may pursue civil remedies for actions taken against him more than ten years ago by the DEA and its agents, is a limited one. It does not speak to the authority of other enforcement agencies or the military, nor to the capacity of the Executive to detain terrorists or other fugitives under circumstances that may implicate our national security interests. The Fourth Circuit recently underscored this distinction when it recognized, in approving the detention of an American citizen captured abroad and designated as an "enemy combatant," that it was "not . . . dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers" but rather "with the executive's assertion of its power to detain under the war powers of Article II." *Hamdi v. Rumsfeld,* 316 F.3d 450, 473 (4th Cir.2003). We, by contrast, are dealing with the former, not the latter.

BACKGROUND

In February 1985, DEA Special Agent Enrique Camarena-Salazar ("Camarena") was abducted and brought to a house in Guadalajara, Mexico, where he was tortured and murdered. Alvarez, a Mexican citizen and a medical doctor who practices in Guadalajara, was present at the house.

Five years after Camarena's death, a federal grand jury in Los Angeles indicted Alvarez for participating in the scheme, and the United States District Court for the Central District of California issued a warrant for his arrest. The United States negotiated with Mexican government officials to take custody of Alvarez, but made no formal request to extradite him. Instead, DEA headquarters in Washington, D.C., approved the use of Mexican nationals, who were not affiliated with either government, to arrest Alvarez in Mexico and to bring him to the United States.

The DEA agent in charge of the Camarena murder investigation, Hector Berellez ("Berellez"), with the approval

of his superiors in Los Angeles and Washington, hired Antonio Garate-Bustamante ("Garate"), a Mexican citizen and DEA operative, to contact Mexican nationals who could help apprehend Alvarez. Through a Mexican intermediary, Ignacio Barragan ("Barragan"), Garate arranged for Jose Francisco Sosa ("Sosa"), a former Mexican policeman, to participate in Alvarez's apprehension. Barragan told Sosa that the DEA had obtained a warrant for Alvarez's arrest, would pay the expenses of the arrest operation, and, if the operation was successful, would recommend Sosa for a position with the Mexican Attorney General's Office.

On April 2, 1990, Sosa and others abducted Alvarez from his office and held him overnight at a motel. The next day, they flew him by private plane to El Paso, Texas, where federal agents arrested him. Alvarez was later arraigned and transported to Los Angeles for trial. He remained in federal custody from April 1990 until December 1992.

Alvarez moved to dismiss the indictment, arguing that the federal courts lacked jurisdiction to try him because his arrest violated the United States-Mexico Extradition Treaty. Both the district court and this court agreed, *see United States v. Alvarez-Machain ("Alvarez-Machain I"),* 946 F.2d 1466, 1466-67 (9th Cir.1991) (per curiam), *affg United States v. Caro-Quintero,* 745 F.Supp. 599 (C.D.Cal.1990), but the Supreme Court reversed and remanded the case for trial. *See United States v. Alvarez-Machain ("Alvarez-Machain II"),* 504 U.S. at 669-70, 112 S.Ct. 2188.

The Supreme Court held that Alvarez's arrest did not violate the United States-Mexico Extradition Treaty. Applying the doctrine announced in *Ker v. Illinois,* 119 U. S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), the Court held that a court retains its power to try a person for a crime even where the person has been brought within the court's jurisdiction by forcible abduction. *Alvarez-Machain II,* 504 U.S. at 670, 112 S.Ct. 2188. Significantly, however, the Court noted that

Alvarez's abduction "may be in violation of general international law principles" and did not foreclose Alvarez from later pursuing a civil remedy. *See id.* at 669, 112 S.Ct. 2188; *see also Ker*, 119 U.S. at 444, 7 S.Ct. 225 (stating that "[t]he [kidnapped] party himself would probably not be without redress, for he could sue [the kidnapper] in an action of trespass and false imprisonment, and the facts set out in the plea would without doubt sustain the action").

Following the Supreme Court's ruling, the case proceeded to trial in 1992. After the presentation of the government's case, the district judge granted a motion for judgment of acquittal on the ground that the government had adduced insufficient evidence to support a guilty verdict. The court concluded that the case against Alvarez was based on "suspicion and . . . hunches but . . . no proof," and that the government's theories were "whole cloth, the wildest speculation."

In 1993, after returning to Mexico, Alvarez filed this action against Sosa, Garate, five unnamed Mexican civilians, the United States, and four DEA agents. The amended complaint alleged a number of conventional and constitutional torts.[1]

The district court substituted the United States for the DEA agents, except Sosa and Garate, on all nonconstitutional claims. The parties later stipulated to the substitution of the United States for Garate. Sosa's interlocutory appeal on the substitution motion was dismissed for lack of appellate

[1] Specifically, Alvarez alleged the following conventional tort claims: (1) kidnapping; (2) torture; (3) cruel, inhuman, and degrading treatment or punishment; (4) arbitrary detention; (5) assault and battery; (6) false imprisonment; (7) intentional infliction of emotional distress; (8) false arrest; (9) negligent employment; and (10) negligent infliction of emotional distress. Alvarez alleged constitutional torts under the Fourth, Fifth, and Eighth Amendments for the acts of kidnapping, torture, cruel and inhuman and degrading treatment or punishment, denial of adequate medical treatment, and arbitrary detention.

jurisdiction. *See Alvarez-Machain v. United States ("Alvarez-Machain III")*, 107 F.3d 696, 700 n. 2 (9th Cir.1997) (as amended).

In *Alvarez-Machain III*, we also affirmed the district court's dismissal of the constitutional claims arising out of harms suffered by Alvarez in Mexico, the denial of the DEA agents' defense based on qualified immunity, and the denial of the United States' defense that the FTCA claims were time-barred. We reversed the district court's dismissal of a claim under the Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73. 107 F.3d at 703-04.[2]

Upon remand, the district court entered summary judgment for Alvarez on his claims against Sosa for kidnapping and arbitrary detention under the ATCA. The court held that both state-sponsored, transborder abductions and arbitrary detentions violated customary international law.[3] The court granted summary judgment to the United States, however, on Alvarez's FTCA claims, concluding that Alvarez's apprehension was privileged and was not a false arrest under California law.

These rulings left for resolution the question of Sosa's liability on the remaining tort claims, as well as the calculation of damages on the kidnapping and arbitrary detention claims. After a bench trial, the district court found for Sosa on all remaining claims and held that Alvarez could recover damages under the ATCA only for his detention in Mexico prior to his arrival in the United States. The court applied federal common law, rather than Mexican law, for the calculation of damages and awarded Alvarez $25,000.

[2] The constitutional claims under *Bivens v. Six Unknown Named Agents, 403 U.S. 388*, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and the Torture Act claim are no longer at issue.

[3] The district court found that a third claim brought by Alvarez under the ATCA for cruel, inhuman, and degrading treatment was barred by the law of the case.

These consolidated appeals followed. Sosa appeals the judgment against him, claiming that the district court erred in allowing a cause of action under the ATCA and in applying federal common law, rather than Mexican law, for the calculation of damages. On the ATCA claims, Alvarez appeals the district court's substitution of the United States for the DEA agents and the limitation of damages to those suffered during his imprisonment in Mexico. He also appeals the dismissal of his FTCA claims.

A three judge panel of this court affirmed Sosa's liability on the ATCA claims, upheld the substitution and damages rulings under ATCA, and reversed the dismissal of Alvarez's FTCA claims. *Alvarez-Machain v. United States ("Alvarez-Machain IV")*, 266 F.3d 1045, 1064 (9th Cir.2001), *reh g en banc granted*, 284 F.3d 1039, 1040 (9th Cir.2002).

DISCUSSION

I. ALIEN TORT CLAIMS ACT-JURISDICTION AND CAUSE OF ACTION

The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Although enacted in 1789 as part of the first Judiciary Act, the ATCA received little attention until 1980,[4] when the Second Circuit, in a comprehensive analysis of the statute, held that the ATCA provided subject matter jurisdiction over an action brought by Paraguayan citizens for torture-a violation of the law of

[4] In 1975, Judge Friendly remarked that the statute had been invoked so rarely since its inception that it existed as "a kind of legal Lohengrin; although it has been with us since the first Judiciary Act ... no one seems to know whence it came." *HT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir.1975) (noting the paucity of cases under the Act and holding that no jurisdiction existed under the Act for fraud and securities claims against foreign corporations).

nations-committed in Paraguay. *See Filartiga v. Pena-Irala (Filartiga I)*, 630 F.2d 876 (2d Cir.1980).

Since the *Filartiga I* decision, the ATCA has been invoked in a variety of actions alleging human rights violations. *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir.1996) (affirming judgment under ATCA against former Ethiopian official for torture and cruel, inhuman, and degrading treatment); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir.1995) (concluding that alleged war crimes, genocide, torture, and other atrocities committed by a Bosnian Serb leader were actionable under the ATCA); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir.1984) (dismissing for lack of subject matter jurisdiction claims brought against the Palestine Liberation Organization, the Libyan government, and other entities for terrorist activities allegedly in violation of the law of nations); *Xuncax v. Gramajo*, 886 F.Supp. 162 (D.Mass. 1995) (deeming torture, summary execution, "disappearance," and arbitrary detention by Guatemalan military to be actionable violations under the ATCA).

Our first opportunity to address the scope of the ATCA came in *Trajano v. Marcos (In re Estate of Marcos Human Rights Litig.) ("Marcos I")*, 978 F.2d 493 (9th Cir.1992), a wrongful death action against former Philippine President Ferdinand Marcos and his daughter for the torture and murder of a Philippine citizen. We recognized that "it would be unthinkable to conclude other than that acts of official torture violate customary international law," and concluded that the plaintiff, an alien, had properly invoked the subject matter jurisdiction of the federal courts under the ATCA. *Id.* at 499 (citation and internal quotation marks omitted). Referencing an April 1787 letter from James Madison to Edmond Randolph, we concluded that "[t]here is ample indication that the 'Arising Under' Clause was meant to extend the judicial power of the federal courts . . . to 'all cases which concern foreigners.'" *Id.* at 502. Because the "Arising Under" Clause

gave Congress the power to enact the ATCA, we held that exercising jurisdiction over the claims would not run afoul of Article III of the Constitution. *Id.* at 502-03.

When the Marcos litigation returned to this court in *Hilao v. Estate of Marcos (In re Estate of Marcos, Human Rights Litig) ("Marcos II"), 25* F.3d 1467 (9th Cir.1994), we further delineated the contours of the ATCA.[5] We resolved that the Act not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations: "[S]ection 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action." *Id.* at 1475 (quoting *Tel-Oren, 726* F.2d at 779 (Edwards, J., concurring)). In other words, "[n]othing more than *a violation* of the law of nations is required to invoke section 1350." *Id.* (citation omitted).

Of course, not every violation of international law constitutes an actionable claim under the ATCA. In *Marcos II,* we were careful to limit actionable violations to those international norms that are "specific, universal, and obligatory." *Id.* at 1475. This formulation, which lays the foundation for our approach to international norms, is in keeping with the narrow scope of ATCA jurisdiction and the general practice of limiting judicial review to those areas of international law that have achieved sufficient consensus to merit application by a domestic tribunal. *See Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 428, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions

[5] Following *Marcos II,* we issued several other decisions in relation to the Marcos litigation, two of which are referenced in this opinion: *Hilao v. Estate of Marcos ("Marcos III"),* 103 F.3d 767 (9th Cir.1996) and *Hilao v. Estate of Marcos ("Marcos IV"),* 103 F.3d 789 (9th Cir.1996).

regarding it . . . ."); *cf. United States v. Smith,* 18 U.S. (5 Wheat.) 153, 162, 5 L.Ed. 57 (1820) (finding piracy "universally treat[ed] . . . as an offence against the law of nations" and "sufficiently and constitutionally defined" by commentators to be punishable by Congress).

Sosa urges a narrow reading of the "law of nations" and a correspondingly strict interpretation of the "specific, universal, and obligatory" requirement. He argues that only violations of *jus cogens* norms, as distinguished from violations of customary international law, are sufficiently "universal" and "obligatory" to be actionable as violations of "the law of nations" under the ATCA. We decline to embrace this restrictive reading, as we are guided by the language of the statute, not an imported restriction.

The term *jus cogens* refers to a category of "peremptory norms" that are "'accepted and recognized by the international community of states as a whole as . . . norm[s] from which no derogation is permitted.'" *Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 714 (9th Cir.1992) (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679). Customary international law, a direct descendent of the "law of nations," is a related, but distinct, concept. *Id.* It refers more generally to those established norms of contemporary international law that are "ascertain[ed] . . . 'by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Id.* at 714-15 (quoting *Smith,* 18 U.S. at 160-61).

We have explained the difference between these two concepts as follows:

> While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by

treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm

. . . .

In contrast, *jus cogens* embraces customary laws considered binding on all nations and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or selfinterested choices of nations. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent. . . .

Because *jus cogens* norms do not depend solely on the consent of states for their binding force, they enjoy the highest status within international law.

Id. at 715 (internal quotation marks and citations omitted).[6]

Given the non-derogable nature of *jus cogens* norms, it comes as no surprise that we have found that *a jus cogens* violation is sufficient to satisfy the "specific, universal, and obligatory" standard. *See Marcos II, 25* F.3d at 1475. But the fact that a violation of this subcategory of international norms is *sufficient* to warrant an actionable claim under the ATCA does not render it *necessary*. Indeed, our recent cases lay out the components of an actionable violation without reference to *jus cogens*. *See Papa v. United States,* 281 F.3d 1004, 1013 (9th Cir.2002) (remanding case to district court to

[6] The commentators embrace this distinction. *See* 1 M. Cherif Bassiouni, *International Criminal Law 40* (2d ed. 1999) ("[A] *jus cogens* norm holds the highest hierarchical position among all other norms and principles. *As* a consequence of that standing, *jus cogens* norms are deemed to be 'peremptory' and 'non-derogable.'"); Ian Brownlie, *Principles of Public International Law* 515 (5th ed. 1998) ("The major distinguishing feature of *[jus cogens]* rules is their relative indelibility.").

apply the "applicable standard," which requires plaintiffs to allege "specific, universal, and obligatory" norms as part of their claim); *Martinez v. City of Los Angeles,* 141 F.3d 1373, 1383-84 (9th Cir.1998) (recognizing, without a discussion of *jus cogens,* that arbitrary detention meets the standard for a cognizable ATCA claim).

The notion of *jus cogens* norms was not part of the legal landscape when Congress enacted the ATCA in 1789. *See* Brownlie, *supra,* at 516 (explaining the modern evolution of *jus cogens).* Thus, to restrict actionable violations of international law to only those claims that fall within the categorical universe known as *jus cogens* would deviate from both the history and text of the ATCA.

Although a strict categorical approach may have surface appeal for its apparent ease of application, it is far from certain which norms would qualify for *jus cogens* status. The development of an elite category of human rights norms is of relatively recent origin in international law, and "[although the concept of jus cogens is now accepted, its content is not agreed." Restatement (Third) of the Foreign Relations Law of the United States § 102 n. 6 (1987) ("Restatement on Foreign Relations"). As one respected commentator put it, "more authority exists for the category of *jus cogens* than exists for its particular content. . . ." Brownlie, *supra,* at 516-17; *see also* Theodor Meron, *On a Hierarchy of International Human Rights,* 80 A.J.I.L. 1, 14-15 (1986) (explaining the difficulties of strict categorization in defining peremptory norms). We therefore remain confident that the standard established in *Marcos II* and repeated throughout our case law best reflects the text and purpose of the ATCA and provides sufficient guidance for evaluating Alvarez's claim.

With this international law background in mind, we turn to Alvarez's contentions on appeal. Alvarez argues that he has a remedy under the ATCA for two separate violations of international law. First, he claims that state-sponsored abduction

within the territory of another state without its consent is a violation of the international law of sovereignty and the customary norms of international human rights law. Second, he contends that his seizure and confinement violated the international customary legal norm against arbitrary arrest and detention.

In view of the dissent's rhetoric and lengthy discourse, it may not be readily apparent that the dissent is in accord with a significant portion of our holding. Ten members of the en banc court agree that Alvarez lacks standing to obtain redress for claims based on an alleged violation of Mexico's sovereignty and that his claim for transborder abduction fails.[7] These same judges also agree that there is a universally recognized norm prohibiting arbitrary arrest and detention. It is only as to the application of this latter norm that we part company.

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[7] Judge Gould's solitary dissent on the political question issue misses the mark, as the other dissenters acknowledge. *See infra* at n. 2 (O'Scannlain, J., dissenting). The mere fact that this case raises difficult and politically sensitive issues connected to our foreign relations does not preclude us from carrying out the legislative mandate of Congress under § 1350. *See Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("[I]t is error to suppose that every case or controversy which touches upon foreign relations lies beyond judicial cognizance."). The crux of the claim here rests on legislative delegation, not foreign relations. We see a critical distinction between, on the one hand, second guessing the foreign policy judgments of the political branches to whom such judgments have been constitutionally assigned and, on the other hand, reviewing claims based in tort and brought under federal statutes instructing the judiciary to adjudicate such claims. *See Kadic*, 70 F.3d at 249 ("The department to whom this [tort suit against the PLO] has been constitutionally committed is none other than our own-the Judiciary.") (internal quotation marks and citation omitted); *Abebe-Jira*, 72 F.3d at 848 (holding that the political question doctrine did not bar tort action brought by former prisoners in Ethiopia under the ATCA).

A. TRANSBORDER ABDUCTION AND THE LAW OF NATIONS

1. STANDING AND SOVEREIGNTY

Alvarez claims that his arrest violated Mexico's sovereign rights because Mexico had not granted the United States permission to exercise police power on its soil. Because such an encroachment on Mexico's sovereignty violates "the law of nations" within the meaning of the ATCA, Alvarez reasons, he is entitled to relief under that statute. The district court agreed and rejected Sosa's objection that Alvarez lacks standing to invoke Mexico's sovereignty rights.

We have little trouble accepting the premise from which Alvarez begins. Few principles in international law are as deeply rooted as the general norm prohibiting acts of sovereignty that offend the territorial integrity of another state. *See generally 1* L. Oppenheim, *Oppenheim's International Law* § 119 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); *see also* F.A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law, in International Law at a Time of Perplexity* 407 & n. 2 (Yoram Dinstein & Mala Tabory eds. 1989) (referring to this "incontrovertible" rule as "elementary"). This tenet, as Alvarez points out, can be traced to the earliest decisions of the Supreme Court. Most notably, in 1812, when faced with the question whether an American citizen could assert title to an armed French vessel found in the territorial waters of the United States, Justice Marshall began his landmark decision by emphasizing the "exclusive and absolute" nature of territorial jurisdiction, exceptions to which "must be traced up to the consent of the nation itself." *Schooner Exchange v. M'Faddon, 11 U.S. (7* Cranch) 116, 136, 3 L.Ed. 287 (1812).

Twelve years later, Justice Story voiced similar sentiments. Analyzing an American seizure of a foreign ship that had

sailed into Spanish waters, he observed that "[i]t would be monstrous to suppose that our . . . officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations." *The Apollon*, 22 U. S. (9 Wheat.) 362, 371, 6 L.Ed. 111 (1824).

Alvarez seeks to invoke a principle, concomitant with this precept of territorial sovereignty, that prohibits a state's law enforcement agents from exercising their functions in the territory of another state without the latter's consent. The Supreme Court clearly recognized this proscription in *The Appollon*. In addition, several notable authorities are in accord. *See* Restatement on Foreign Relations § 432(2) ("A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."); 1 Oppenheim, *supra*, § 119, at 387-88 ("It is ... a breach of international law for a state without permission to send its agents into the territory of another state to apprehend persons accused of having committed a crime."); *see also M.* Cherif Bassiouni, *International Extradition: United States Law and Practice* 255 (4th ed. 2002) (recognizing the rule and noting that it is "grounded in the notion that international law is designed to protect the sovereignty and territorial integrity of states by restricting impermissible state conduct"). But whatever the modern contours of this principle or its corollaries, they are inapplicable here and need not be explored because Alvarez cannot establish, as a threshold mater, that he has standing to assert Mexico's interests in its territorial sovereignty.[8]

[8] Although we need not examine the place of such a rule in customary international law or as it applies to this case, we note that Alvarez's assertion is not wholly straightforward, as it raises complex questions about the intersection of extraterritorial criminal jurisdiction, extraterritorial enforcement, and state sovereignty. The three concepts are not necessarily correlative as a matter of international law. *See, e.g., S.S. Lotus* (Turk. v. Fr.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7) ("The territoriality of criminal law . . . is not an absolute principle of international law and by no means coincides with territorial sovereignty."). And although extraterritoriality is well-established in our jurisprudence, *see infra* Part I.B., to the extent that either extraterritorial jurisdiction or extraterritorial enforcement overlap with the national laws and policies of another state, inevitably there is a potential for friction between states. *See* Bassiouni, *International Extradition*, *supra*, at 314 n. 1.

The Supreme Court has instructed that to meet the "irreducible constitutional minimum of standing" under Article III, plaintiffs must "[f]irst and foremost" show the existence of an "injury in fact." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (internal citations and quotation marks omitted). Related to this constitutional prerequisite is a separate "prudential" requirement of standing: plaintiffs must demonstrate they are "proper proponents of the particular legal rights on which they base their suit." *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). This requirement applies "even when the very same allegedly illegal act that affects the litigant also affects a third party." *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 720, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990). Although Alvarez may have properly alleged that Mexico's sovereignty was infringed during his abduction-an issue we need not resolve here-he has not demonstrated that he is a proper party to vindicate Mexico's national interests.

Alvarez argues that he meets the standing requirements because courts may review ATCA claims whenever an alien "is injured tortiously in the course of the defendant's violation of international law." But the ATCA creates a remedy for "a tort ... committed in violation of the law of nations," not "in the course of" any recognized international law violation. 28 U.S.C. § 1350. The legal rights on which

Alvarez bases his claim, and which the ATCA recognizes, are those that protect the individual from tortious conduct. By its terms, the ATCA provides only for suits by individual aliens; it does not allow for an individual to vindicate the rights of a foreign government.

To allow state-on-state injuries like the one Alvarez alleges here to be vindicated by a third party not only would read too much into the ATCA, but would lead to the judiciary's intrusion into matters that are appropriately reserved for the Executive branch. Although international human rights litigation under the ATCA inevitably raises issues implicating foreign relations, sovereigns' prerogatives are ordinarily and traditionally handled through diplomatic channels.[9] The right of a nation to invoke its territorial integrity does not translate into the right of *an individual* to invoke such interests in the name of the law of nations.

Alvarez seeks refuge in *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), the case that previously doomed his attempt to secure dismissal of his criminal indictment. *See Alvarez-Machain II*, 504 U.S. at 662, 112 S.Ct. 2188. Like Alvarez, Ker claimed forcible abduction from a foreign country, in his case Peru. Although the Supreme Court refused to dismiss Ker's indictment, it observed that Ker was "probably not . . . without redress, for he could sue [his abductor] in an action of trespass and false imprisonment." *Ker*, 119 U.S. at 444, 7 S.Ct. 225. The Court made no guarantees, however, regarding a claim under the

[9] We do not mean to imply that an individual never has a claim for breach of the law of nations for which a state-to-state remedy also exists. *See* Restatement on Foreign Relations § 703(1) (establishing states' rights to take action against fellow states that transgress international human rights norms). We note, however, that the commentary of the Restatement on Foreign Relations indicates that most state-to-state remedies are subordinated to individual remedies where transgressor states' domestic law makes such remedies available. *See id.* §§ 703 cmt. d, 713 cmt. f.

ATCA or any other federal statute; nor did it intimate that Ker could sue to avenge Peru's sovereignty rights. Rather, the Court noted that Peru could pursue a separate remedy—the kidnapper's extradition. *Id. Ker* thus implicitly drew the distinction between vindication of individual rights and a sovereign's vindication of its rights. *Ker* does not bridge the gap in Alvarez's claim.

2. TRANSBORDER ABDUCTION AND CUSTOMARY INTERNATIONAL LAW

Apparently cognizant of the constitutional barrier to his claim, Alvarez offers an alternative theory: he seeks to bypass the standing hurdle by arguing that, notwithstanding any infringements upon Mexico's sovereignty, the act of transborder kidnapping was, in itself, a violation of customary international human rights law. This norm, as defined by Alvarez, creates *a personal* right under the law of nations.

Sosa, the DEA agents, and the United States all urge that this norm fails the law of nations test. They contend that the prohibition that Alvarez identifies has not reached the level of acceptance in the international community sufficient to qualify as "universal" and "obligatory." They also argue that, whatever degree of agreement other nations have reached, the United States has affirmatively and definitively rejected this principle. We agree. The United States does not recognize a prohibition against transborder kidnapping, nor can it be said that there is international acceptance of such a norm.

We embrace the Supreme Court's directive that the law of nations "may be ascertained by consulting the work of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law." *Smith*, 18 U.S. at 160-61; *see also The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900) ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision,

resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators. . . ."). Evidence of the law of nations may also be garnered from international agreements and United Nations declarations. *See Siderman*, 965 F.2d at 716-17; *Filartiga I*, 630 F.2d at 883-84.

Article 38 of the Statute of the International Court of Justice serves as a convenient summary of the sources of international law, although we recognize that defining "[t]he 'sources' of international law is a subject of much continuing scholarship." *United States v. Yousef*, 327 F.3d 56, 100-01 (2d Cir.2003). Article 38 provides, in part:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general ractice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[10]

Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, U.S.T.S. 993.

[10] Article 59 states: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

International agreements to which the United States is a signatory provide an obvious and convenient starting point. It would be, of course, a relatively simple analysis if we could pinpoint in such an agreement a prohibition against transborder abductions. Despite eloquent arguments to the contrary, we find no such support in the text of any international agreement.

Alvarez and the amici point to a number of international human rights instruments which, they argue, support an individual right to remain free of transborder abductions. But no authority cited by Alvarez recognizes an explicit prohibition against forcible abduction.[11] Rather, each of the authorities speaks to general prohibitions against restricting an individual's right to freedom and movement and security of person. For example, the American Convention on Human Rights ("American Convention"), which Alvarez cites, states that "[e]very person has the right to personal liberty and security" and "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." Art. 7(1), 7(2), *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (signed but not ratified by the United States). Similarly, the International Covenant on Civil and Political Rights ("ICCPR") provides that "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." Art. 12, G.A. Res. 2200, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the United States Sept. 8, 1992). *See also* Universal Declaration of

[11] The Restatement on Foreign Relations reflects this void: "None of the international human rights conventions to date . . . provides that forcible abduction or irregular extradition is a violation of international human rights law." Restatement on Foreign Relations § 432 n. 1.

Human Rights ("Universal Declaration"), art. 13(1), G.A. Res. 217A (III), 3 U.N. GAOR, Supp. No. 16, U.N. Doc. A/810 (1948) ("Everyone has the right to freedom of movement and residence within the borders of each state.");[12] American Declaration of the Rights and Duties of Man, art. VIII, May 2, 1948, O.A.S. Res. XXX, *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.LV/II. 82 doc. 6 rev. 1, at 17 (1992) ("Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will."). Such general prohibitions are insufficient to support Alvarez's claim that there is an international norm against transborder abduction because an actionable claim under the ATCA requires the showing of a violation of the law of nations that is "specific, universal, and obligatory."

Looking beyond the declarations and covenants to treaties does not yield a different result.[13] At the time of Alvarez's abduction, the United States-Mexico Extradition Treaty did not extend to transborder abduction and there was no separate treaty with such a prohibition. *See Alvarez-Machain II*, 504 U.S. at 669-70, 112 S.Ct. 2188. The absence of any agreement is consistent with our conclusion that the United States has not embraced the prohibition urged by Alvarez. That is not to say that Alvarez's abduction went unnoticed. Indeed, it was met with a formal diplomatic protest by Mexico and considerable public outcry.[14]

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[12] We have recognized that the Universal Declaration, although not binding on states, constitutes "a powerful and authoritative statement of the customary international law of human rights." *Siderman*, 965 F.2d at 719.

[13] The ATCA permits suits for both a "violation of the law of nations" and torts in violation of "a treaty of the United States." 28 U.S.C. § 1350.

[14] The Mexican Government filed an official protest with the United States, presenting a diplomatic note to the U.S. Department of State on three separate occasions. *See* Brief for the United Mexican States as Amicus Curiae in Support of Affirmance at 3-4, *Alvarez-Machain II*, *reprinted in* 31 I.L.M. 934, 938-39 (1992); *see also Caro-Quintero*, 745 F.Supp. at 604. The resulting friction between the United States and Mexico was well documented. *See, e.g.*, Marjorie Miller & Douglas Jehl, *Mexico to Confront US. on Camarena Case Abduction*, L.A. Times, April 18, 1990, at A1; Carlyle C. Douglas, *Arm of US. Law Is Too Long, Mexico Complains*, N.Y. Times, April 22, 1990, § 4, at 11; Jack Epstein, *Growing Uproar in Mexico About Alleged Abuses by U.S.*, S.F. Chron., July 7, 1992, at A8.

In 1994, four years after Alvarez was abducted, the United States and Mexico reached an agreement to prohibit the practice of transborder arrest. Treaty to Prohibit Transborder Abductions, Nov. 23, 1994, U.S.-Mex., *reprinted in* Michael Abbell, *Extradition to and From the United States*, at A-303 (2002). That agreement is not yet in force, however, because the President has not submitted it to the Senate for its advice and consent. *See id.* at A-287. In any event, the proposed treaty would not help Alvarez: it would explicitly foreclose the right of abductees to sue their abductors. *See id.* at A-303. If anything, this development underscores the void that existed before the treaty was signed and the reality that the United States does not yet consider itself bound by the supposed norm against transborder abductions. Alvarez offers no other legislative or judicial source that supports a specific, enforceable norm against transborder abductions.

The United States claims that unilateral, transborder abductions are a "rare" occurrence. And the notion of sneaking across the border to nab a criminal suspect surely raises more than a diplomatic eyebrow. Nonetheless, our review of the international authorities and literature reveals no specific binding obligation, express or implied, on the part of the United States or its agents to refrain from transborder kidnapping. Nor can we say that there is a "universal" consensus in the sense that we use that term to describe well-entrenched customs of international law. Any agreement that

may exist on this score has failed to surface in the declarations and accords that commonly manifest the mutual concern of states. *See Filartiga I*, 630 F.2d at 888 ("It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute."). Because a human rights norm recognizing an individual's right to be free from transborder abductions has not reached a status of international accord sufficient to render it "obligatory" or "universal," it cannot qualify as an actionable norm under the ATCA. This is a case where aspiration has not yet ripened into obligation.[15]

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[15] The dissent asserts that we could shortcut our analysis and make ATCA review "easier" by determining, as a threshold matter, whether the United States, through the political branches, has decided variously not to "recognize," "assent," "agree with," or "subscribe to" an international norm prohibiting transborder arrests. Should the United States demonstrate any form of non-acquiescence, the customary international law norm would, according to the dissent, fail to achieve "universal" status for purposes of ATCA liability.

Although we accept the well-established principle that customary-norms are fundamentally based on the consent of states, and that the United States might well decide to deliberately disavow or repudiate certain principles of international law, we cannot agree with the dissent's implication that every executive branch decision to breach an international norm translates into a more global repudiation of that norm or necessarily insulates the United States and its agents from civil tort liability. Our understanding accords with *Ker*, 119 U.S. at 444-45, 7 S.Ct. 225 (holding that civil remedies might still be available for violations of treaties or the law of nations even though jurisdiction to prosecute a defendant criminally may not be invalidated by an extraterritorial abduction), and the Supreme Court's more recent acknowledgment that Alvarez might be correct that his abduction was "shocking" and "in violation of general international law principles" *Alvarez-Machain II*, 504 U.S. at 669, 112 S.Ct. 2188; *see also The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900) (stating that "[i]nternational law is part of our

B. ARBITRARY ARREST AND DETENTION AND THE LAW OF NATIONS

Alvarez is not, however, without a remedy. The unilateral, nonconsensual extraterritorial arrest and detention of Alvarez were arbitrary and in violation of the law of nations under the ATCA.

1. THE PROHIBITION AGAINST ARBITRARY ARREST AND DETENTION

Unlike transborder arrests, there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention. This prohibition is codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions. *See M.* Cherif Bassiouni, *Human Rights in the Context of Criminal Justice. Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 260-61 (1993). The Universal Declaration perhaps the most well-recognized explication of international human rights norms, provides that "[n]o one shall be subjected to

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law," and that "where there is no treaty, and no *controlling* executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . .") (emphasis added); *Yousef*, 327 F.3d at 92 n. 25 ("While it is not possible to claim that the practice or policies of any one country, including the United States, has any such authority that the contours of customary international law may be determined by reference *only* to that country, it is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States and/or other prominent players in the community of States could be deemed to qualify as *a bona fide* customary international law principle.") (emphasis added); Louis Henkin, Foreign Affairs and the U.S. Constitution 243 (2d ed. 1996) (explaining that "[u]nlike treaties ... principles of customary international law cannot be denounced or terminated by the President and cannot be eliminated from the law of the United States by *any* Presidential act.") (emphasis added).

arbitrary arrest, detention, or exile," Universal Declaration, art. 9, and the ICCPR, which the United States has ratified,[16] unequivocally obliges states parties to refrain from "arbitrary arrest or detention." ICCPR, art. 9.[17]

We recently reaffirmed the universal, obligatory, and specific nature of this norm in *Martinez*, 141 F.3d at 1384 (recognizing a "clear international prohibition against arbitrary arrest and detention"); *see also Marcos IV*, 103 F.3d at 795 (recognizing "arbitrary detention ... as[an] actionable violation[ ] of international law"). We explained, in defining the norm, that "[d]etention is arbitrary 'if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Martinez*, 141 F.3d at 1384 (quoting Restatement on Foreign Relations § 702 cmt. h).[18]

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[16] The ICCPR is one of several international covenants designed to formally codify many of the rights embodied in the Universal Declaration. *See* Brownlie, *supra*, at 576.

[17] Each of the regional human rights instruments contains a similar prohibition. *See* American Convention, art. 7(3) ("No one shall be subject to arbitrary arrest or imprisonment."); European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), art. 5(1), *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (deprivation of liberty must be "in accordance with a procedure prescribed by law" and only in the case of, *inter alia*, "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority. . . ."); African Charter on Human and Peoples' Rights ("African Charter"), art. 6, June 27, 1981, 21 I.L.M. 58 (1982) ("[N]o one may be arbitrarily arrested or detained.").

[18] Our standard reflects the language of the Restatement as well as other major international sources. *See* Restatement on Foreign Relations § 702 cmt. h; ICCPR, art. 9(1) ("No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."); *id.*, art. 9(5) ("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."); European Convention, art. 5(1) (deprivation of liberty must be "in accordance with a

Sosa acknowledges the prohibition against arbitrary arrest and detention, but he contends that for ATCA liability to attach, Alvarez's detention must be "prolonged" in addition to being arbitrary. We can divine no such requirement in our precedent or in the applicable international authorities. Rather, as the language of the international instruments demonstrates, the norm is universally cited as one against "arbitrary" detention and does not include a temporal element. Other authorities reflect this understanding. *See, e.g.*, Bassiouni, *Human Rights in the Context of Criminal Justice*, *supra*, at 260; Paul Sieghart, *The International Law of Human Rights* 135-59 (1983); *see also* United Nations Study, *supra*, at 5-8 (defining elements of the norm without mention of a temporal component).[19]

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procedure prescribed by law" and only in the case of, *inter alia*, "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority. . . ."); African Charter, art. 6 ("No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."); *see also Winterwerp v. Netherlands*, 33 Eur. Ct. H.R. (ser. A.) at para. 39 (1979) ("[N]o detention that is arbitrary can ever be regarded as lawful."); United Nations, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention, and Exile* 7 (1964) ("United Nations Study") (adopting the view that "an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with the respect for the right to liberty and security of person").

[19] This reading is also supported in the case law. *See, e.g., de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir.1985) (recognizing "the right not to be arbitrarily detained" as part of the law of nations); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir.1981) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."); *Paul v. Avril*, 901 F.Supp. 330, 333-34, 335 (S.D.Fla.1994) (concluding plaintiff suffered arbitrary detention although he was held for less than ten hours); *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1541 (N.D.Cal. 1987) ("There is case law finding sufficient consensus to evince

Although § 702 of the Restatement on Foreign Relations includes a reference to "prolonged arbitrary detention,"[20] neither the Restatement nor our cases import a separate temporal requirement for purposes of ATCA liability. Section 702 contains a short list of human rights norms that it deems sufficient to qualify as customary law violations. *See* Restatement on Foreign Relations § 702(a)-(g). But the comments to § 702 clarify that the list is non-exhaustive and that virtually all of the norms listed, including "prolonged arbitrary detention," belong among the elite set of *jus cogens* norms that are non-derogable. *Id.* cmts. a, n. Section 702 does not state that every arbitrary detention must be "prolonged" to qualify as a violation of the law of nations—which is all that is required under the ATCA-and in fact implies the opposite. *See id.* cmt. ("A single, brief, arbitrary detention by an official of a state party to one of the principal international agreements might violate that agreement."). Likewise, our holding in *Martinez*, which cited the Restatement, included the length of detention as but one factor among many in determining whether a violation of the law of nations had occurred. 141 F.3d at 1384.

This is not to say that the length of detention cannot be a factor in evaluating whether there was an actionable violation of international law. Indeed, an extended detention following

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a customary international human rights norm against arbitrary detention. The consensus is even clearer in the case of a state's *prolonged* arbitrary detention of its own citizens." (internal citations omitted)); *see also Litwa v. Poland*, App. No. 26629/95, 33 Eur. H.R. Rep. 53 (2000) (finding detention of six hours and thirty minutes constitutes violation under Article 5 of the European Convention); *Quinn v. France*, App. No. 18580/91, 21 Eur. H.R. Rep. 529 (1995) (finding claim of arbitrary detention under Article 5 of the European Convention where petitioner was detained for a period of eleven hours).

[20] The Restatement provides that "[a] state violates international law if . . . it practices, encourages, or condones . . . prolonged arbitrary detention." Restatement on Foreign Relations § 702(e).

an improper arrest would necessarily contribute to "arbitrariness." We simply hold, consistent with international law, that there is no freestanding temporal requirement nor any magical time period that triggers the norm.

2. APPLICATION OF ARBITRARY ARREST AND DETENTION STANDARD TO ALVAREZ

The standard then is whether the arrest and detention were arbitrary, that is, "not pursuant to law."[21] *Martinez*, 141 F.3d at 1384. In the case before us, there was, quite simply, no basis in law for the unilateral extraterritorial arrest and related detention of Alvarez in Mexico.

The only instrument Sosa can point to as evidence that Alvarez's abduction was "pursuant to law" is an arrest warrant issued by the United States District Court for the Central District of California. But a federal arrest warrant, without more, hardly serves as a license to effectuate arrests worldwide. It is no accident that the warrant is directed to "The United States Marshal and any *Authorized* United States Officer" (emphasis added). The Federal Rules of Criminal Procedure in effect at the time of Alvarez's arrest provided that "[a] warrant may be executed . . . within the jurisdiction of the United States." Fed.R.Crim.P. 4(d)(2).[22] The language

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[21] Although the norm against arbitrary arrest and detention may encompass both illegal and unjust acts, we need not decide here under what circumstances an "unjust" arrest or detention might qualify as "arbitrary." *See, e.g.*, Restatement of Foreign Relations § 702 n. 6 ("Detention is arbitrary if it is unlawful or unjust."); Laurent Marcoux, Jr., *Protection from Arbitrary Arrest and Detention Under International Law*, 5 B.C. Int'l Comp. & L. Rev. 345 (1982) (analyzing the language and drafting history of the Universal Declaration and ICCPR as evidence that the term "arbitrary" was chosen to encompass a broader standard than mere unlawfulness).

[22] Rule 4(d)(2) was amended on December 1, 2002. The Rule, renumbered as 4(c)(2), now reads, "A warrant may be executed, or a summons served, within the jurisdiction of the United States *or anywhere else a*

could hardly be clearer-"within the jurisdiction of the United States" means exactly what it says.[23]

Despite the clear limitation on the extraterritorial reach of the arrest warrant, Sosa would have us believe that Alvarez's arrest in Mexico was authorized under American law.[24] The

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federal statute authorizes an arrest" (underscoring indicates amendment). The advisory committee notes clarify that the "new language . . . reflects the recent enactment of the Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488) that permits arrests of certain military and Department of Defense personnel overseas. *See also* 14 U.S.C. § 89 (Coast Guard authority to effect arrests outside territorial limits of United States)." Fed.R.Crim.P. 4 advisory committee's note. The calibraion of Rule 4 to statutes in which Congress has made explicit the territorial reach of the arrest power demonstrates not only the limited scope of a traditional arrest warrant, but Congress's own recognition that it must speak clearly when expanding the geographical scope of an agent's extraterritorial arrest authority.

[23] Alvarez, of course, was only one of many charged in comection with Camarena's murder. An indictment issued on January 30, 1985 charged twenty-two persons with crimes in connection with Camarena's murder. Seven were tried in federal court. Including Alvarez, thee of the seven were brought "by means of covert forcible abductior from their homelands." *Caro-Quintero*, 745 F.Supp. at 602. Alvarez's abduction was unique in that it involved neither the cooperation of local police nor the consent of a foreign government. *See United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1216 (9th Cir.1988), *rev'd*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (Camarena murder suspect arrested by local Mexican police after U.S. arrest warrant was issued and suspect was handed over to U.S. Marshals at the U.S.-Mexico border); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 256 (7th Cir.1990) (Camarena murder suspect arrested in Honduras by Honduran Special Troops accompanied by U.S. Marshals; suspect driven to U.S. Air Force Base and flown to U.S.). Others were arrested in the United States. *See United States v. Lopez Alvarez*, 970 F.2d 583, 586 (9th Cir.1992); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1203 (9th Cir.1991).

[24] The district court emphasized that no warrant was issued by Mexican authorities and no Mexican official lawfully effectuated the arrest. Although the district court focused on this lack of local authority, our analysis centers on the DEA's authority under United States law. We do

United States takes the same position in its defense against Alvarez's false arrest claim, which we discuss in a later section but which is also relevant here. Both parties conclude that the federal officers (and, by implication, Sosa) were authorized by statute to make warrantless arrests outside the United States. Because the criminal statutes under which Alvarez was charged have extraterritorial application, the argument goes, Congress must have granted DEA agents broad authority to enforce those statutes beyond our borders.

The proper starting point is, of course, the applicable statutory scheme. We begin with a well-established canon of construction. "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Amer. Oil Co. ("Aramco")*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949)). "In applying this principle, 'we assume that Congress legislates against the backdrop of the presumption against extraterritoriality.'" *Smith v. United States*, 507 U.S. 197, 204, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993) (quoting *Aramco*, 499 U.S. at 248, 111 S.Ct. 1227). "[T]he presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind." *Id.* at 204 n. 5, 113 S.Ct. 1178. The canon also "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248, 111 S.Ct. 1227 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963)).

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not hold that extraterritorial authority in this case rests on "the consent or assistance of the host country," despite the dissent's preoccupation with the subject in Section III.B. of its opinion.

The Supreme Court, in recognizing this principle, has carved out an exception for a narrow class of substantive criminal statutes. In *United States v. Bowman*, 260 U.S. 94, 43 S.Ct. 39, 67 L.Ed. 149 (1922), the Court reviewed a criminal fraud provision used to indict individuals who committed acts on a U.S. vessel outside of American territorial waters. The Court reiterated its presumption that, in most cases, if a substantive criminal provision is to be applied extraterritorially, "it is natural for Congress to say so in the statute." *Id.* at 98, 43 S.Ct. 39. But the Court found that "the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated." *Id.*

We have no doubt that the substantive criminal statutes under which Alvarez was charged apply to acts occurring outside the United States. Invoking the rules of construction just described, we reasoned in *United States v. Vasquez-Velasco*, 15 F.3d 833, 839-41 (9th Cir.1994), that 18 U.S.C. § 1959, the racketeering statute under which Alvarez was indicted, applied extraterritorially. Later, we applied the same principles to conclude that "Congress intended to apply statutes proscribing the kidnapping and murder of DEA agents extraterritorially." *Felix-Gutierrez*, 940 F.2d at 1204.

These cases reinforce the established proposition that certain criminal statutes are applicable to conduct occurring outside of the borders of the United States. It was precisely this principle of extraterritoriality that led the Supreme Court to conclude that Alvarez could be tried in the United States. *Alvarez II*, 504 U.S. at 657 & n. 1, 112 S.Ct. 2188. And it is this same concept that is invoked in case after case to assert jurisdiction over defendants-whether United States or foreign nationals-for criminal conduct occurring outside of the United States. *See, e.g., United States v. Neil*, 312 F.3d

419, 421-23 (9th Cir.2002) (applying extraterritoriality principle to bring citizen of St. Vincent and the Grenadines to trial in U.S. for sexual assault on cruise ship in Mexican territorial waters after cruise ship landed in U.S.); *United States v. Hill, 279* F.3d 731, 739-40 (9th Cir.2002) (applying harboring statute extraterritorially to bring to trial wife of violator of Deadbeat Parents Punishment Act arrested in U.S.); *Chua Han Mow v. United States*, 730 F.2d 1308, 1311-12 (9th Cir.1984) (applying drug importation and distribution statutes extraterritorially to prosecute Malaysian defendant extradited to U.S.); *Yousef*, 327 F.3d at ___ - ___, 2003 U.S.App. LEXIS 6437, at *29-*45 (applying provisions of the Destruction of Aircraft Act extraterritorially to conduct of terrorists who, after being arrested by Philippine and Malaysian police and later turned over to the FBI, were prosecuted for their participation in a conspiracy to bomb United States commercial airliners in Southeast Asia).[25]

This proposition is not, however, the same as the far-reaching principle advocated by Sosa and the government, namely that a statute with extraterritorial application automatically carries with it the authority for United States agents to detain and arrest suspects worldwide. Extra-

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[25] Congress has extended the United States' substantive criminal jurisdiction extraterritorially in a host of statutes, all of which state clearly their jurisdictional reach. *See, e.g.*, 18 U.S.C. § 1119 (murder of U.S. national in a foreign country); 18 U.S.C. § 2332b (foreign terrorist activity in the U.S.); 18 U.S.C. §§ 1512(h), 1513(d) (witness tampering); 18 U.S.C. § 175 (use of biological weapons); 18 U.S.C. §§ 351, 1751 (crimes committed against high government officials); 18 U.S.C. § 1956 (money laundering); 18 U.S.C. § 2339B (assistance to foreign terrorist organizations); 18 U.S.C. § 1203(b)(1) (implementing Hostage Convention); 50 U.S.C. § 424 (extraterritorial jurisdiction over crimes relating to disclosure of national security information); 18 U.S.C. § 32(b) (violence against individual aboard or destruction of any "civil aircraft registered in a country other than the United States while such aircraft is in flight" or in service).

territorial *application*, in other words, does not automatically give rise to extraterritorial *enforcement* authority. Such a leap is too facile. That Congress may have intended the reach of a criminal statute to extend beyond our borders does not mean that Congress also intended to give federal law enforcement officers unlimited authority to violate the territorial sovereignty of any foreign nation to enforce those laws, or to breach international law in doing so. *Bowman* does not countenance such an extension, and our cases have never so held.[26]

In *Bowman*, the Supreme Court focused on the nature of the criminal conduct as a guide to determining the territorial reach of criminal statutes, but balanced that concern against limitations imposed by international law. The Court stated that "[t]he necessary locus, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations." 260 U.S. at 97-98, 43 S.Ct. 39. The Court repeatedly made reference to "the locus of the offense [ ]" and "the locus of [the] crime . . . in a foreign country," not to extraterritorial enforcement powers of the United States authorities. *Id.* at 97, 99, 43 S.Ct. 39. The court also emphasized that, by extending the reach of the substantive criminal statutes at issue, it was not imposing upon the sovereignty of other states.[27] *Id.* at 102-03, 43 S.Ct. 39.

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[26] This basic distinction between the reach of the substantive criminal laws and the reach of law enforcement makes imminent sense in light of the myriad ways in which the United States regularly achieves lawful custody of persons located abroad. The options are many, ranging from purely formal means-such as extradition pursuant to a treaty or local statute, formal deportation, and revocation of passports—to purely diplomatic tactics, such as informal deportation and negotiation. *See Abbell, supra*, § 7-2, at 7-14-7-17.

[27] The Court noted that because three of the defendants charged were citizens of the United States and were found in New York, "it is no

Similarly, when we interpreted the criminal statutes for which Alvarez was indicted extraterritorially, we did so only with regard to the location of the conduct at issue. And even then we did so cautiously to ensure that we did not unnecessarily impinge on the sovereignty of other states or ignore accepted principles of international law. *See Vasquez-Velasco*, 15 F.3d at 839-40; *Felix-Gutierrez*, 940 F.2d at 1205-06; *Chua Han Mow*, 730 F.2d at 1311-12.

Taking the extraterritorial application of the applicable criminal laws as a given, the question then becomes whether Congress has separately authorized the unilateral, extraterritorial *enforcement* of those provisions in a foreign country by agents of the United States. The United States insists that such authority can be found in a provision in the Controlled Substances Act, 21 U.S.C. § 878, which grants certain powers to DEA and other law enforcement personnel.[28]

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offense to the dignity or right of sovereignty of Brazil to hold them for this crime." *Bowman*, 260 U.S. at 102, 43 S.Ct. *39*. The Court expressly reserved the question whether the United States had jurisdiction over the fourth defendant, a citizen of Great Britain. *Id.* at 102-03, 43 S.Ct. 39.

[28] Section 878 of the Act provides:

> (a) Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may—
>
> (1) carry firearms;
>
> (2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;
>
> (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

Subsection 878(a)(3) of that provision authorizes DEA agents to make warrantless arrests on probable cause for suspected felony violations. 21 U.S.C. § 878(a)(3). Although this subsection grants DEA agents felony arrest power, no language in the statute provides, or even suggests, that Congress intended that power to extend outside the borders of the United States. Given that the provision applies to DEA agents as well as "any State or local law enforcement officer designated by the Attorney General," it would in fact be anomalous to read subsection (3) as the statutory basis for a geographically limitless arrest power. Nor can such power be found in the catchall language of subsection (5), which states that DEA agents, as well as designated state and local officials, may "perform such other law enforcement duties as the Attorney General may designate." 21 U.S.C. § 878(a)(5). Again, nothing in the text of the statute remotely indicates that Congress sought to extend DEA arrest authority to any territory outside American borders.

Although legislative silence is not necessarily dispositive, these provisions must be construed against the backdrop of *Aramco's* presumption against extraterritoriality. Even the narrow *Bowman* exception offers no safe harbor.[29] Section

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(4) make seizures of property pursuant to the provisions of this subchapter; and

(5) perform such other law enforcement duties as the Attorney General may designate.

21 U.S.C. § 878(a).

[29] We observe that *Bowman's* exception may be limited not only by its own language, but also in its application. *Aramco* did not mention *Bowman* at any point in its discussion of the presumption against extraterritoriality. We have interpreted the Court's silence as an indication that *Bowman* remains the law. *See Felix-Gutierrez*, 940 F.2d at 1205 n. 3. The Second Circuit, however, has held that *Bowman* should, at best, be interpreted narrowly. *See Kollias v. D&G Marine Maint.*, 29 F.3d 67, 71 (2d Cir.1994) ("At best . . . the holding in *Bowman* should be read narrowly so as not to conflict with these more recent pronouncements on

878(a) regulates executive authority, not criminal conduct. And this provision can hardly be classified as a "criminal statute[ ] which [is] . . . not logically dependent on [its] locality for the Government's jurisdiction." *Bowman*, 260 U.S. at 98, 43 S.Ct. 39. To hold otherwise would essentially swallow the presumption against extraterritoriality and grant, without express congressional authorization, worldwide law enforcement authority to United States officials (and to state and local officials upon designation by the Attorney General). Virtually a limitless number of statutes would have both extraterritorial reach and the prospect of extraterritorial enforcement. Surely such a result would all but eviscerate the longstanding principle that our laws generally apply only within our territorial borders.

Faced with congressional silence on the matter, the United States analogizes this case to *United States v. Chen*, 2 F.3d 330 (9th Cir.1993). The issue in *Chen* was whether agents of the Immigration and Naturalization Service acted outside their statutory authority by conducting an undercover investigation into the smuggling of Chinese aliens into the United States from international waters. The operation involved planting undercover agents on a chartered boat (the Corinthian) that rendezvoused with a Chinese ship some 320 miles off the coast of California. The agents watched and videotaped as the Chinese aliens boarded the Corinthian, keeping the aliens under surveillance during and after their entry into the United States. *Id.* at 332.

In evaluating whether the INS exceeded its statutory authority, we looked to 8 U.S.C. § 1103(a), the statute charging the Attorney General with enforcement of the Immigration and

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extraterritoriality."). Although we have implicitly rejected this latter interpretation, *see, e.g., United States v. Corey*, 232 F.3d 1166, 1170 (9th Cir.2000), the Second Circuit's concerns underscore the fact that we should not cavalierly cast aside the presumption against extraterritoriality in the face of the Supreme Court's recent jurisprudence.

Nationality Act, and determined that Congress had given the Attorney General "extremely broad powers" to administer and enforce the immigration laws by directing the Attorney General to "perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." *Chen*, 2 F.3d at 333 (citation and internal quotation marks omitted). We inferred from the broad language of § 1103(a) that "Congress intended to grant the Attorney General the corresponding power to enforce the immigration laws both within and without the borders of the United States." *Id.* We also pointed to § 1103(b), which specifically authorizes the Attorney General to delegate this broad authority to the Commissioner of the INS. Finally, we were careful to note that the Attorney General had in fact exercised this authority and had explicitly delegated her broad enforcement powers to the Commissioner under 8 C.F.R. § 2.1. *Id.* at 334. This chain of authority, we reasoned, provided "the legal basis for the INS and its agents to undertake offshore undercover investigations such as this one." *Id.*

But this case is not *Chen*. First, the INS operation in *Chen*, which consisted solely of observing and recording events, did not take place within the boundaries of another sovereign, but rather in international waters. That operation-unlike the abduction of a foreign citizen from a friendly neighbor-did not trigger any allegations of a breach of a law of nations. In fact, *Chen* did not even address international law, as traditional sovereignty concerns were not at issue. This distinction is critical, for one of the bedrock principles embodied in the presumption against extraterritoriality is that we must "protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248, 111 S.Ct. 1227; *see also Kollias*, 29 F.3d at 70 (applying the same rationale). If *Chen's* expansion of INS authority to the high seas did not raise concerns about clashing with laws of another sovereign, the case before us most certainly presents that danger.

Second, the demonstrated chain of delegated authority on which *Chen* relied, extending from Congress to the Attorney General to the INS Commissioner to the INS agents, has not been shown to exist with respect to the DEA. Section 878(a)(3) does grant DEA agents broad authority to make warrantless arrests, and § 878(a)(5) does confer the authority to "perform such other law enforcement duties *as the Attorney General may designate*." 21 U.S.C. § 878(a)(5) (emphasis added). But even if *Chen* were to direct us to infer extraterritoriality from this bare language-a proposition that we do not accept-there is no evidence in this record that the Attorney General has in fact authorized the DEA Administrator to perform whatever extraterritorial enforcement powers the Attorney General may have—either generally or as to this abduction.[30]

The importance of obtaining specific authorization for extraterritorial law enforcement operations is brought into

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[30] No regulation concerning the DEA's authority is analogous to the Attorney General's delegation of authority to the INS Commissioner in 8 C.F.R. § 2.1. In any event, there is no evidence that anyone ranking higher than the DEA Deputy Administrator or the United States Attorney for the Central District of California explicitly approved the operation. In view of this delegation vacuum, perhaps it is no surprise that the Department of Justice now requires explicit advance approval for such operations:

> Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators) by means of *Alvarez-Machain* type renditions without advance approval by the Department of Justice. Prosecutors must notify the Office of International Affairs before they undertake any such operation. If a prosecutor anticipates the return of a defendant, with the cooperation of the sending State and by a means other than an *Alvarez-Machain* type rendition, and that the defendant may claim that his return was illegal, the prosecutor should consult with the OIA before such return.

Department of Justice, United States Attorneys' Manual, § 9-15.610.

sharper relief by the fact that had the INS operation in *Chen* occurred within the boundaries of a foreign nation, rather than in international waters, the Attorney General (or the Commissioner, acting under delegated authority) would have been statutorily required to consult with the Secretary of State before deploying INS agents abroad. *See* 8 U.S.C. § 1103(a)(7) ("[A]fter consultation with the Secretary of State, [the Attorney General] may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries."). Such a restriction on the Attorney General's extraterritorial enforcement power, even in an area as obviously international as immigration, is evidence that Congress did not contemplate giving field agents the authority to act unilaterally in deciding to cross the borders of a friendly nation and abduct one of its citizens over that nation's objection. If the Attorney General must consult with the Secretary of State before dispatching INS agents to foreign lands, then surely, absent explicit statutory authorization, the Deputy Administrator of the DEA is not free to take it upon himself to send agents across the border into Mexico or to hire Mexican bounty hunters to act as surrogates to abduct a suspect.

Chen thus stands for only the proposition that the INS possesses limited delegated authority to conduct an operation on the high seas. At no point did we hold or even suggest that Congress has given license to the executive branch to violate international law in the course of enforcing criminal statutes that have extraterritorial reach. And surely *Chen* does not support the proposition that Congress has *sub silencio* delegated to the executive branch the authority to unilaterally enter a friendly nation and abduct one of its citizens in violation of international law.

Reading a generally worded statute like 21 U.S.C. § 878(a)(5) as evidence that Congress has given the DEA carte blanche to effectuate arrests within any sovereign state

would require us to make the untenable assumption that Congress, in drafting such a statute, turned a blind eye to the interests of equal sovereigns and the potential violations of international law that would inevitably ensue.[31] This we cannot do. *See McCulloch*, 372 U.S. at 21, 83 S.Ct. 671 (1963) ("'[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.'" (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64,2 L.Ed. 208 (1804))).

We are not suggesting that Congress lacks the power to enact laws authorizing extraterritorial law enforcement powers. Nor do we question the powers of the political branches to override the principles of sovereignty in some circumstances, should the need arise. Rather, we are simply saying that we cannot impute such an intent where it is not expressed, and Congress has expressed no such intent here.[32]

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[31] Congress is well aware of the importance of respecting territorial sovereignty, and it has shown caution in expanding extraterritorial jurisdiction at the expense of this obligation. For instance, in passing the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, 22 U.S.C. § 4801 *et seq.*, Congress refused to adopt a provision authorizing "self-help" measures. *See Bills to Authorize Prosecution of Terrorists and Others Who Attack US. Government Employees and Citizens Abroad. Hearing on 5.1373, S. 1429, and S. 1508, Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 63 (1985). Similarly, in passing the Anti-Drug Abuse Act of 1986, Congress required the Coast Guard to obtain foreign flag consent to board a foreign flag vessel on the high seas. Pub. L. No. 99-570, § 2015, 100 Stat. 3207, 3268 (repealed 1994).

[32] The dissent believes we should ignore well-established principles of statutory construction and give Congress the benefit of the doubt because we have recognized that "[d]elegation of foreign affairs authority is given . . . broader deference than in the domestic arena." *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438 (9th Cir.1996). But *Freedom to Travel* and the other non-delegation cases cited by the dissent are inapplicable here. We have no quarrel with the position that Congress, in giving the Executive authority over matters of foreign affairs, may

Congress has shown that it is quite capable of making clear when arrest powers should have extraterritorial effect. *See Aramco*, 499 U.S. at 258, 111 S.Ct. 1227 ("Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute."). In defining the law enforcement powers of the Coast Guard, for example, Congress provided that "[t]he Coast Guard may make . . . arrests upon the high seas and waters over which the United States has jurisdiction." 14 U.S.C. § 89(a). The powers of customs officials on the high seas have likewise been clearly articulated. *See* 19 U.S.C. § 1701 (permitting customs officials to seize or arrest in those areas of the high seas designated as customs-enforcement areas by the President).

More recently, in the Military Extraterritorial Jurisdiction Act of 2000,[33] Congress included clear and separate provisions pertaining both to the extraterritorial scope of the substantive crime *and* the executive agency's power to arrest. Section 3261(a), relating to certain members and employees of the Armed Forces, addresses the extraterritorial scope of the substantive crime:

> Whoever *engages in conduct outside the United States* that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial

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delegate authority through broad (albeit not limitless) directives. *See Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). Rather, we are simply saying that there is no evidence in the applicable statutory scheme that Congress ever granted the DEA the power to conduct arrests abroad. Hence, we do not address whether 21 U.S.C. § 878 is an impermissible delegation of congressional power.

[33] This legislation was quickly enacted in response to the Second Circuit's decision in *United States v. Gatlin*, 216 F.3d 207 (2d Cir.2000), which highlighted a gap in prosecutions of civilian personnel living abroad with the military.

> jurisdiction of the United States . . . shall be punished as provided for that offense.

18 U.S.C. § 3261(a) (emphasis added). Section 3262(a), pertaining to "arrest and commitment," explicitly lays out the scope of arrest powers:

> The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense *to arrest*, in accordance with applicable international agreements, *outside the United States* any person described in section 3261(a) [of the Act] if there is probable cause to believe that such person violated section 3261(a).

18 U.S.C. § 3262(a) (emphasis added).[34] If Congress thought it could rely on courts to supply extraterritorial scope through searching interpretations of vague statutes, no such language would be necessary.

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[34] The government points to other statutes pertaining to the military's powers overseas, such as 10 U.S.C. § 374(b)(1)(D) and 18 U.S.C. § 351, arguing that these provisions "plainly envision foreign law enforcement activity." We agree. These statutes underscore the point that Congress is clear when it wishes to be. Section 374(b)(1)(D) allows the Secretary of Defense, upon the request of a federal law enforcement agency, to make defense personnel available "to operate equipment" with respect to "a rendition of a suspected terrorist from a foreign country to the United States to stand trial." Section 351 allows the FBI to request assistance from the military, as well as "any Federal, State, or local agency," in "investigat[ing]" kidnappings or assassinations of Congressional, Cabinet, and Supreme Court members. Not only do these statutes not speak to military arrest powers, but they define the universe (e.g., operating equipment or assisting in investigation) in which Congress has chosen to involve the military in law enforcement overseas. Section 374(b)(1)(D) is one of a number of provisions, along with the Posse Comitatus Act, 18 U.S.C. § 1385, that actually limit military involvement in civilian law enforcement operations. In considering 10 U.S.C. §§ 371-80, we concluded that "these sections impose limits on the use of American armed forces abroad." *United States v. Khan*, 35 F.3d 426, 431 n. 6 (9th Cir. 1994).

Wishful thinking is no substitute for clear congressional authority. Congress surely knows how and when to expand the reach of its laws beyond our borders. There is little doubt that Congress has the authority to do so; there is also little doubt that it has not done so here. Thus, although we recognize that the kidnapping and murder of DEA agents abroad necessitates the exercise of extraterritorial criminal jurisdiction, absent a clear directive, we cannot conclude that Congress has given the DEA unlimited enforcement powers abroad. Finding no basis in law for the DEA's actions, and left only with a warrant issued by a United States court, we conclude that Alvarez's arrest, and hence his detention, were arbitrary because they were not "pursuant to law." Consequently, Alvarez established a tort committed in violation of the law of nations.

II. ALIEN TORT CLAIMS ACT—SUBSTITUTION OF THE UNITED STATES FOR THE DEA AGENTS

We next consider whether the district court appropriately substituted the United States for the individual government defendants. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), 28 U.S.C. § 2679, provides that, for civil actions arising out of the wrongful act of a federal employee acting within the scope of his official duties, the United States is to be substituted as a defendant and the claims may proceed only under the FTCA. 28 U.S.C. § 2679(b)(1). This exclusive remedy provision does not apply, however, in an action "which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B). Alvarez argues that the ATCA falls within this exemption.

But we agree with the three judge panel's conclusion that the exemption does not apply here, and that the United States was properly substituted for the individual DEA agents.

Alvarez-Machain IV, 266 F.3d at 1053. Accordingly, we adopt the relevant portion of that opinion:

> The district court held that an action under the ATCA was not exempt from the exclusive remedy provision of the Liability Reform Act. It reasoned that "it is international law, not the ATCA," that gives individuals fundamental rights. Therefore, a claim under the ATCA is based on a violation of international law, not of the ATCA itself.
>
> This reading is consistent with the Supreme Court's reasoning in *United States v. Smith*, 499 U.S. 160, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991). In *Smith*, the Court rejected the argument that a claim for medical malpractice was "authorized" by the Gonzalez Act and therefore fit the 28 U.S.C. § 2679(b)(2)(B) exception for violations of a statute. The court explained: "[n]othing in the Gonzalez Act imposes any obligations or duties of care upon military physicians. Consequently, a physician allegedly committing malpractice under state or foreign law does not 'violate' the Gonzalez Act." *Smith*, 499 U.S. at 174, 111 S.Ct. 1180.[35] The same can be said of the ATCA. The language of § 1350 creates no obligations or duties. Admittedly, the ATCA differs from the Gonzalez Act in that it creates a cause of action for violations of international law, whereas the Gonzalez Act limited the common law liability of doctors. *See*

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[35] The relevant provision of the Gonzalez Act provides:

> The remedy against the United States provided by [the FTCA] for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician . . . of the armed forces . . . while acting within the scope of his duties or employment . . . shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician . . . whose act or omission gave rise to such action or proceeding.

10 U.S.C. § 1089(a) (1994).

> *Marcos II*, 25 F.3d at 1475 (rejecting the argument that the ATCA is merely jurisdictional); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir.1996); *Filartiga*, 630 F.2d at 885-86. Nonetheless, we find nothing in this distinction to cause us to deviate from the plain language of the statute. We therefore agree with the district court that Alvarez's claims under the ATCA were subject to substitution under the Liability Reform Act. Accordingly, Alvarez's exclusive remedy against the United States, in lieu of the DEA agents, is through the FTCA.

Id. at 1053-54.

Because the United States is substituted for the DEA agents, we treat the claims brought against the agents within the context of the FTCA. *See* § IV *infra*.

III. ALIEN TORT CLAIMS ACT—DAMAGES

A. CHOICE OF LAW

In addressing the matter of damages related to Sosa's liability under the ATCA, we must first determine the applicable substantive law. We review de novo the district court's decision concerning the appropriate choice of law. *Abogados v. AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir.2000).

Two obvious choices present themselves in this cross-border dispute: the domestic law of the United States and that of Mexico. The district court chose to apply federal common law, rather than Mexican law, in fashioning a damages award for Sosa's ATCA violations. The court reasoned that Mexican law would "inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States." *Alvarez-Machain v. United States*, No. 93-4072, slip op. at 33 (Sept. 9, 1999) (quoting *Filartiga v. Pena-Irala ("Filartiga II")*, 577 F.Supp. 860, 864 (E.D.N.Y. 1984)).

The precise issue before us, the choice of law for damages under the ATCA, is one of first impression. In *Marcos III*, we construed the district court's award of exemplary damages as having embraced Philippine law and concluded that this was not an error because such damages were allowed under Philippine law. 103 F.3d at 779-80. Our holding in *Marcos III*, however, went no further. We did not review the district court's choice of law analysis or enumerate the circumstances in which foreign law would apply. *See id.* (noting that there was "no ruling by the district court expressly choosing Philippine law").

The few courts that have addressed damages under the ATCA do not appear to have followed a consistent approach in determining the applicable law. Perhaps the most explicit treatment of the issue was offered by the district court in the *Filartiga* litigation. When faced with the question of damages on remand, the district court decided, in light of the ATCA's purpose, that federal choice of law principles should govern the initial determination of the remedy. *See Filartiga II*, 577 F.Supp. at 863. Applying these principles in the broadest of terms, the court noted that virtually all of the contacts took place in Paraguay, and thus Paraguayan law appeared to be appropriate for setting compensatory damages. *Id.* at 863-64. The court took a different tack, however, on punitive damages. Because Paraguay did not recognize punitive damages, which were deemed necessary "to give effect to the manifest objectives of the international prohibition against torture," the court turned to international law principles. *Id.* at 865.

Other courts awarding damages in the wake of *Filartiga II* have adopted a number of approaches. Most courts have not directly addressed the choice of law dilemma, while others have offered variations on the *Filartiga II* theme. *See, e.g., Tachiona v. Mugabe*, 234 F.Supp.2d 401, 418-22 (S.D.N.Y. 2002) (addressing the choice of law issue, but abandoning a

traditional choice of law analysis in favor of a more "flexible" approach for determining both substantive rights and remedies); *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1358-59 (N.D.Ga.2002) (conducting no choice of law analysis but making repeated references to "international law" in awarding both compensatory and punitive damages); *Xuncax*, 886 F.Supp. at 183, 198 (using an analysis similar to that of *Tachiona); Avril*, 901 F.Supp. at 335 (citing *Filartiga II* for the position that both compensatory and punitive damages are available but providing no indication as to which law was applied).[36]

Mindful of this varied landscape, we begin our inquiry with a traditional choice of law analysis. As the Supreme Court has counseled, "[c]hoice of law is, of course, determined by the forum jurisdiction," *Zicherman*, 516 U.S. at 228-29, 116 S.Ct. 629, which in this case is federal court. Federal question jurisdiction was predicated on the ATCA and thus federal common law applies to the choice-of-law determination. *See Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1297 (9th Cir. 1997) (holding that federal common law applies to choice-of-law determination in federal question case).[37] Under federal common law, we look to the

[36] It bears noting that most of the cases addressing damages under the ATCA have done so without the benefit of, or without reference to, *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 229, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996), in which the Supreme Court interpreted the damages provisions of the Warsaw Convention and concluded that it does not "empower us to develop some common-law rule-under cover of general admiralty law or otherwise-that will supersede the normal federal disposition." The Court held that the Convention "provide[d] nothing more than a pass-through, authorizing us to apply the law that would govern in the absence of the Warsaw Convention," which in that case was the Death on the High Seas Act, 46 U.S.C.App. § 761. *Zicherman*, 516 U.S. at 229, 116 S.Ct. 629.

[37] Although the Second Circuit observed in *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir.1996), that "the law is

Restatement (Second) of Conflict of Laws ("Restatement of Conflicts") for guidance. *Schoenberg v. Exportadora de Sal, S.A.*, 930 F.2d 777, 782 (9th Cir.1991) (explaining, in the context of the Foreign Sovereign Immunities Act, that "[f]ederal common law follows the approach of the Restatement (Second) of Conflict of Laws"); *see also Bickel v. Korean Air Lines Co.*, 83 F.3d 127, 130 (6th Cir.1996) (noting, in the context of the Warsaw Convention, that "[i]n the absence of any established body of federal choice of law rules, we begin with the Restatement (Second) of Conflict of Laws. . . .").

Section 145[38] of the Restatement, which delineates the general principles applicable to torts, states that the "rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6."[39] The section continues by listing the following

unsettled when it comes to applying either a federal common law choice of law rule or state choice of law principles in non-diversity cases," we believe that both *Zicherman* and our precedent support the application of federal common law conflicts principles.

[38] Sosa urges us to look to § 146 of the Restatement which provides, with respect to personal injury actions, that there is a presumption in favor of applying "the local law of the state where the injury occurred," which in this case was Mexico. But the tort here-arbitrary arrest and detention as a recognized violation of international law-is not a classic personal injury claim. Nor does Alvarez's claim "involve either physical harm or mental disturbance . . . resulting from physical harm" as envisioned by § 146. Restatement of Conflicts § 146 cmt. b. Finally, the presumption is not absolute and other considerations weigh in favor of applying United States law.

[39] The factors in § 6 include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

"contacts" that should "be taken into account in applying the principles of § 6 to determine" the state with the "most significant relationship":

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

Id. § 145(2).

These principles are meant to serve as a guide for consideration of competing policy choices. The factors, coupled with the contacts, are not necessarily of equal weight, nor do they lend themselves to a bean-counting exercise in which everything is lined up on a ledger and the answer emerges. Indeed, as noted in the comment, "[a]t least some of the factors . . . will point in different directions in all but the simplest case." *Id.* § 6 cmt. c. This international dispute illustrates in practical terms the reality of that admonition. In a claim based on a universal, international standard, it may seem presumptuous to choose the law of one country over another. Admittedly, the needs of the international system are often too complex to dictate a clear choice, in part because our task is limited to a legal analysis and we leave foreign policy to the Executive branch and the diplomats.

> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Id. § 6(2).

Nonetheless, we are driven to make a choice so that damages may be assessed in accord with the substantive law of a chosen jurisdiction.

Stepping back and looking at the overall picture, we view this case as a series of events that began and ended in the United States, and which are inextricably intertwined with the United States government. The United States' interests are particularly pointed here: the United States itself is a party, and it is the conduct of the United States government, in its efforts to bring a suspect to justice, that spawned the international incident. The genesis of the crucial events was a federal criminal prosecution of Alvarez in Los Angeles. DEA agents working in the United States devised a plan, which they hired Sosa to carry out, and without which the tort would not have occurred. Sosa acted according to DEA instructions when he helped detain Alvarez and transport him to the United States for trial. Sosa himself had no justifiable expectation that Mexican law would apply, particularly because he was employed as an agent of the American government, and because this is a tort, rather than a contract, case. The relationship between Sosa and Alvarez was intimately connected with, and a direct product of, the interests of the United States government. Just as importantly, the tort is predicated on an arrest and detention that were arbitrary because the agents exceeded the scope of their authority under United States law.

As Sosa points out, some of the Restatement factors weigh in favor of applying Mexican law. Alvarez's actual arrest occurred in Mexico. Both Alvarez and Sosa were Mexican citizens and residents at the time of the events in question (although Sosa later moved to the United States). As a result, Mexico may in fact have competing interests-seeking to obtain compensation for its citizen, Alvarez, while limiting damages from Sosa, another of its citizens.

Nonetheless, we must also take into account the policy of the United States, as expressed in the ATCA, to provide a remedy for violations of the law of nations. *See Marcos II*, 25 F.3d at 1475. We agree with the district court that limitations on damages under Mexican law—including the unavailability of punitive damages—are not consistent with the congressional policy that underlies the ATCA.

After weighing these factors, we conclude that the relative importance of United States contacts and interests counsels in favor of applying United States law. Our ruling today does not foreclose the application of foreign law in another circumstance; it is simply the appropriate outcome given the factors and policies present in this suit.

Our choice of law conclusion brings us to another level of inquiry: In applying United States law, should we apply federal common law or the law of California? We are aware of the Supreme Court's view that we should not reach out to extend federal common law. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83-84, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) (explaining the presumption in favor of incorporating state law to provide the content of federal common law, and that "a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards . . . or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand. . . .").

On the other hand, because the ATCA invokes international law principles of universal concern, it holds a unique place among federal statutory tort causes of action, and

application of federal common law is therefore appropriate.[40] *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (observing that, in "international disputes implicating . . . relations with foreign nations . . . our federal system does not permit the controversy to be resolved under state law" because the "international nature of the controversy makes it inappropriate for state law to control"); *see also Sabbatino*, 376 U.S. 398, 427 n. 25, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (noting that the ATCA is an example of a statute reflecting a "concern for uniformity in this country's dealings with foreign nations").

B. SCOPE OF DAMAGES

The district court determined that Alvarez could recover damages only for activities taking place prior to the point that United States law enforcement authorities took him into custody, not for the entire period in which he was imprisoned in the United States. We review this question of law de novo. *See United States v. Stephens*, 237 F.3d 1031, 1033 (9th Cir.2001).

There is no established body of case law applying federal common law to determine the proper scope of damages for arbitrary arrest and detention. Although several federal cases have awarded damages for this brand of international law violation, none of those cases dealt with the unique set of facts presented here. *See, e.g., Xuncax*, 886 F.Supp. at 19798 (awarding damages for arbitrary detention authorized by Guatemala's Minister of Defense). Even so, we agree with the district court that existing principles governing false arrest provide adequate guidance.

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[40] Although we apply federal common law, we note that, as discussed below, the result would be the same under state law.

In the context of law enforcement, the federal courts are largely in accord that, consistent with the principles of tort law, the chain of causation set in motion by the initial act of misconduct of one actor can be broken by the acts of a third party. For example, police officers have been held to be insulated from liability for deprivations of liberty where there are independent, intervening acts of other decision-makers in the criminal justice system, such as prosecutors, grand juries, or judges. *See Heck v. Humphrey*, 512 U.S. 477, 484, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) ("'If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more.'" (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser & Keeton on the Law of Torts* 888 (5th ed. 1984))); *Townes v. City of New York*, 176 F.3d 138, 147 (2d Cir.1999) (holding that the trial judge's independent decision not to suppress evidence, though erroneous, broke the chain of causation for purposes of police officer's liability); *Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir.1989) (holding that intervening acts of prosecutor, grand jury, and judge broke chain of causation); *Hand v. Gary*, 838 F.2d 1420, 1427-28 (5th Cir.1988) (holding that a sheriff's actions were not the proximate cause of damages given intervening acts of federal agents, federal prosecutors, and grand jury). In this connection, we have held that the "[f]iling of a criminal complaint immunizes investigating officers . . . from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time." *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir.1981).[41]

[41] Our holding in *Smiddy* was limited. We concluded that the presumption that the prosecutor exercised independent judgment can be rebutted by, for instance, "a showing that the [prosecutor] was pressured or caused by the investigating officers to act contrary to his independent judgment," or by "the presentation by the officers to the [prosecutor] of information known by them to be false." 665 F.2d at 266-67.

These principles of proximate causation, taken in combination with the Supreme Court's holding in *Alvarez-Machain II*, guide us in assessing the scope of Sosa's liability. Sosa's participation in Alvarez's arrest and detention in this case took place almost solely within the confines of Mexico. Although he was guided by the unlawful directives of American DEA agents, once he delivered Alvarez to United States authorities in El Paso, the actions of domestic law enforcement set in motion a supervening prosecutorial mechanism which met all of the procedural requisites of federal due process and ultimately received the blessing of the United States Supreme Court. *See Alvarez-Machain II*, 504 U.S. at 669-70, 112 S.Ct. 2188. To be sure, a grand jury had already indicted Alvarez and an American arrest warrant had been issued by the time Sosa was hired, giving this case a unique factual twist when compared to traditional false arrest cases. But, as we have explained, these procedural formalities stand apart from the illegitimacy that characterized Alvarez's initial arrest and detention, and came into operation only at the moment Alvarez set foot on U.S. soil. At that point, the criminal justice system, with proper jurisdiction, began its march toward trial and the chain of causation linked to Sosa's actions was broken, thus limiting Sosa's liability for damages.

Because the district court cited California law for its damages analysis, the parties focus on the nuances of California law, despite framing the issue in terms of choosing either federal common law or Mexican law. Applying California law, however, yields the same result. The California Supreme Court recently rejected a plaintiff's claim of false imprisonment for the entire time he was held in custody. *See Asgari v. City of Los Angeles*, 15 Cal.4th 744, 63 Cal.Rptr.2d 842, 937 P.2d 273, 281 (1997). Relying on state statutes, the court explicitly distinguished the rebuttable presumption rule of *Smiddy*, clarifying that a police officer's liability for false arrest could not, even with a showing of bad faith, include

damages caused by incarceration following arraignment because that result would thwart the applicable statutes' directives. *Id.* at 279.

Alvarez seeks to distinguish *Asgari* by arguing that it is a narrow holding based only on immunity principles grounded in the California Tort Claims Act, specifically Cal. Gov.Code § § 820.4 and 821.6. Instead, he urges us to rely on an earlier case, *Gill v. Epstein*, 62 Cal.2d 611, 44 Cal.Rptr. 45, 401 P.2d 397 (1965), which held, prior to the enactment of the above provisions, that a plaintiff could recover damages arising from his incarceration after his arraignment because the arraignment was not an independent act that could break the chain of causation. *Id.* at 401. But *Gill* does not help Alvarez. In *Gill,* the plaintiff was arrested without a warrant, and the case was dismissed at a preliminary hearing five days after the arraignment. *Id.* at 398-99. The court held that the plaintiff could recover for damages up until the time an independent judgment was made as to probable cause for his arrest. *See id.* at 401. Here, there is no question that at the time Alvarez was arrested, an independent judgment had already been made that he should be brought to trial.[42] As a result, Alvarez is entitled to damages only to the point at which he was handed over to U.S. authorities.

IV. FEDERAL TORT CLAIMS ACT

The FTCA acts as a limited waiver of the sovereign immunity of the United States for certain torts committed by its employees. 28 U.S.C. §§ 1346(b), 2674. The statute

[42] Although we decline to speak for the California Supreme Court as to the status of *Gill* after *Asgari*, we note also that in *Asgari* the court looked not only to statutory immunity principles but also to the broader proximate cause principles articulated in New York's *Broughton* rule, which measures liability only up to the time of arraignment or indictment, whichever comes first. *See Asgari*, 63 Cal.Rptr.2d 842, 937 P.2d at 281 n. 10 (citing *Broughton v. State*, 37 N.Y.2d 451, 373 N.Y.S.2d 87, 335 N.E.2d 310, 316 (1975)).

provides that the United States shall be "liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. At issue here is whether Alvarez's claims fit within the FTCA's waiver provision or instead fall specifically within any of the statutory exclusions to FTCA jurisdiction-in particular, the "foreign activities" exception or the "intentional tort" exception.

The United States argues that Alvarez's kidnapping lies outside the jurisdiction of the FTCA. But we agree with the district court that neither exception applies.

A. "FOREIGN ACTIVITIES" EXCEPTION

The foreign activities exception bars recovery for "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). Its purpose is "to ensure that the United States is not exposed to excessive liability under the laws of a foreign country over which it has no control." *Nurse v. United States*, 226 F.3d 996, 1003 (9th Cir.2000). The district court held that many of Alvarez's claims, such as assault and the resulting infliction of emotional distress, derived from acts that took place entirely in Mexico and so were excluded under the ATCA. Alvarez does not appeal that decision.

But the district court permitted other claims-false arrest, false imprisonment, and the resulting infliction of emotional distress-to go forward under the "headquarters doctrine." Because "[t]he entire scheme of the FTCA focuses on the place where the negligent or wrongful act or omission of the government employee occurred," *Sami v. United States*, 617 F.2d 755, 761 (D.C.Cir.1979), a claim can still proceed under the headquarters doctrine if harm occurring in a foreign country was proximately caused by acts in the United States. *See Nurse*, 226 F.3d at 1003; *see also Cominotto v. United States*, 802 F.2d 1127, 1130 (9th Cir.1986) (holding that an FTCA claim arises where an act or omission occurs and "not

necessarily at the site of the injury or the place where the negligence has its operative effect" (internal quotation marks omitted)).

The quintessential headquarters claim involves federal employees working from offices in the United States to guide and supervise actions in other countries. *See Nurse*, 226 F.3d at 1003 (applying the doctrine to FTCA claims made by a Canadian detained in Vancouver, British Columbia, against the U.S.-based Customs officials who trained the Vancouver agents); *Couzado v. United States*, 105 F.3d 1389, 1395-96 (11th Cir. 1997) (applying the doctrine to claims against DEA agents in the United States who coordinated an arrest in Honduras); *Sami*, 617 F.2d at 761-63 (applying the doctrine to claims against the Chief of the United States National Central Bureau in Washington, D.C., who sent messages causing an improper arrest in Germany). In evaluating whether the headquarters doctrine applies, we look to the law of the state where the alleged act occurred-in this case, California. *See* 28 U.S.C. § 1346(b)(1); *Couzado*, 105 F.3d at 1395 (applying Florida law to determine whether the doctrine applies to alleged negligence by DEA officials who were based in Florida and caused harm in Honduras).

Alvarez's abduction fits the headquarters doctrine like a glove. Working out of DEA offices in Los Angeles, Berellez and his superiors made the decision to kidnap Alvarez and, through Garate, gave Barragan precise instructions on whom to recruit, how to seize Alvarez, and how he should be treated during the trip to the United States. DEA officials in Washington, D.C., approved the details of the operation. After Alvarez was abducted according to plan, DEA agents supervised his transportation into the United States, telling the arrest team where to land the plane and obtaining clearance in El Paso for landing. The United States, and California in particular, served as command central for the operation carried out in Mexico.

By contrast, we see little resemblance to the facts of *Cominotto*, in which we rejected the DEA informant's headquarters claim because he had disobeyed Secret Service orders by jumping into the suspects' car late one night in Bangkok. 802 F.2d at 1130. Alvarez did little but serve as an unsuspecting target of an operation planned in the United States. Under California law, negligent or criminal acts carried out by Alvarez's abductors in furtherance of the objectives given to them by American DEA agents "do not break the causal link between" the conduct of the DEA agents and Alvarez's injuries. *Vickers v. United States*, 228 F.3d 944, 956 (9th Cir.2000). The arrest team's seizure of Alvarez was not the interruption, but the fulfillment, of the DEA agents' tortious acts. The events for which Alvarez seeks relief occurred precisely as the DEA intended.

The United States offers little to support its alternative argument that, even if applicable, the headquarters doctrine does not apply to intentional torts. We see no valid reason to distinguish between negligence and intentional torts when the purpose of the doctrine is to hold the federal government responsible where the plaintiff's injuries are proximately caused by conduct in the United States. *Sami*, 617 F.2d at 762 (noting that examination of the legislative history shows that the foreign activities exception "does not apply if the *wrongful acts or omissions* complained of occur in the United States" (emphasis added)). We hold that the headquarters doctrine applies to both negligence and intentional torts. Alvarez's kidnapping claim therefore does not fall within the foreign activities exception.

B. "INTENTIONAL TORT" EXCEPTION

We also agree with the district court that Alvarez's claims do not fall within the "intentional tort" exception to the

FTCA. *See* 28 U.S.C. § 2680(h).[43] Although the waiver of sovereign immunity under the FTCA excludes intentional torts such as false arrest, this exclusion is followed by an important proviso: It does not apply if the intentional tort is committed by an "investigative or law enforcement officer." *Id. See also Orsay v. United States Dept of Justice*, 289 F.3d 1125, 1134 (9th Cir.2002) (noting that Congress chose "to single out investigative and law enforcement officers from other federal employees" because their "authority to use force and threaten government action carries with it the risk of abuse, or the risk of intentionally tortious conduct").

The DEA agents who orchestrated Alvarez's arrest are law enforcement officers as defined by the FTCA because they are "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). Because the primary tortious act was the initiation and planning of Alvarez's abduction by the DEA agents, his claim falls squarely within this law enforcement proviso, and thus the intentional tort exclusion does not apply.

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[43] The Act provides an exception for

> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

The purpose of the law enforcement proviso in § 2680(h) is to "provid[e] a remedy against the Federal Government for innocent victims of Federal law enforcement abuses." *Orsay*, 289 F.3d at 1134-35 (quoting S.Rep. No. 93-588, 93d Cong., 2d Sess. 3 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 2789, 2792 (1974)). As the original threejudge panel put it, this purpose would be manifestly frustrated if law enforcement officers could avoid liability by recruiting civilians "to do their dirty work." *Alvarez-Machain IV*, 266 F.3d at 1056.

Because neither the "foreign activities" exception nor the "intentional tort" exception applies, we proceed to the merits of Alvarez's false arrest claim under the FTCA.

C. FALSE ARREST CLAIM

The parties agree that if no exception applies, California law determines whether and to what extent the United States is liable. *See* 28 U.S.C. § 1346(b)(1). Because "[u]nder California law, a California court would apply federal law to determine whether an arrest by a federal officer was legally justified and hence privileged," the United States' liability hinges on whether federal employees "complied with applicable federal standards" in seizing Alvarez. *Rhoden v. United States*, 55 F.3d 428, 431 (9th Cir.1995) (per curiam). The government argues that there is no California false arrest because federal law authorized Alvarez's apprehension in Mexico. Our earlier discussion of liability under the ATCA applies with equal force to our analysis of the FTCA claims against the United States. The DEA agents had no authority under federal law to execute an extraterritorial arrest of a suspect indicted in federal court in Los Angeles. *See supra* at § I.B.2.

Notwithstanding the fact that California law looks to federal law to determine the lawfulness of an arrest by federal officers, the district court concluded that Alvarez's abduction

could still be justified as a citizen arrest under California law. The United States urges us to reach the same conclusion, arguing that, in certain situations, California's citizen arrest provision authorizes federal agents to make arrests even where federal authority is lacking.[44] *See United States v. DeCatur*, 430 F.2d 365, 367 (9th Cir.1970) (noting that the arrest of the plaintiff by federal postal agents would have been justified under California Penal Code § 837, even if the agents lacked authority under a federal statute); *People v. Crusilla*, 77 Cal.App.4th 141, 91 Cal.Rptr.2d 415, 421 (1999) (holding that a federal immigration inspector's arrest of defendant was authorized as a citizen arrest).

Reliance on the California law of citizen arrest is misplaced in this context. Although the FTCA holds the United States liable in the same way that a private person would be liable "under like circumstances," 28 U.S.C. § 2674, the law enforcement obligations and privileges of the DEA agents "make the law of citizen arrests an inappropriate instrument for determining FTCA liability." *Arnsberg v. United States*, 757 F.2d 971, 979 (9th Cir.1985); *see also 21* U.S.C. § 878(a)(2); *Ting v. United States*, 927 F.2d 1504, 1514 (9th Cir.1991) (citing *Arnsberg*). In *Arnsberg*, we declined to require Internal Revenue Service agents, who arrested the plaintiff with a defective warrant, to meet the stricter standard for citizen arrests under Oregon law. 757 F.2d at 978-79. Instead, we concluded, "[t]he proper source for determining the government's liability" is "the law governing arrests pursuant to warrants." *Id.* at 979. Applying that law, we determined that the agents acted properly. *Id.*

The principle adopted in *Arnsberg* works both ways: just as the law of citizen arrest cannot be used to limit the authority of law enforcement officers, nor can it be used to

[44] California Penal Code § 837 permits a private citizen to arrest a person "[w]hen a felony has been in fact committed, and he has a reasonable cause for believing the person arrested to have committed it."

extend that authority, by proxy, beyond its territorial limits.[45] The DEA agents, not the Mexican nationals, identified Alvarez and planned the operation in detail; Alvarez's abductors acted merely as pawns. In this situation, the law of citizen arrest simply does not apply.

Although, as in *Arnsberg*, we apply the law governing arrests pursuant to warrants, we see a world of difference between the acts of the law enforcement officers in *Arnsberg* and the DEA agents who planned Alvarez's abduction. In *Arnsberg*, the IRS officials acted "nearly perfectly," consulting with the United States Attorney and arresting the plaintiff pursuant to a warrant with only a minor discrepancy. *Arnsberg*, 757 F.2d at 979. In contrast, as we have discussed, the DEA agents here had no authority, statutory or otherwise, to effect an extraterritorial arrest. Nor did their minions across the border, who could no more claim a lawful privilege to arrest Alvarez than could the DEA agents themselves under the same circumstances. The district court that issued Alvarez's arrest warrant had no jurisdiction to issue a warrant for an arrest in Mexico. *See* Fed.R.Crim.P. 4(c)(2). Accordingly, the DEA agents authorized a false arrest against Alvarez. We reverse the district court's dismissal of the FTCA claims and remand for further proceedings.

[45] The district court noted that Cal.Penal Code § 837 probably permits non-Californians to make a citizen arrest in California. California courts have applied this provision to police officers who make arrests outside of their jurisdiction but within California. *See, e.g., People v. Monson*, 28 Cal.App.3d 935, 105 Cal.Rptr. 92, 95 (1972). California law also permits Mexican police crossing the border in fresh pursuit of a suspect to make an arrest in California, provided that the official brings the prisoner before a magistrate in the county where the arrest occurred. *See* Cal.Penal Code § 852.2. However, these provisions do not authorize a planned, trans-border abduction of an alien by either law enforcement authorities or private citizens.

CONCLUSION

In summary, we affirm the judgment with respect to Sosa's liability under the ATCA, albeit on different grounds than the district court. We also affirm the substitution of the United States for the DEA agents, the choice of United States rather than Mexican law to determine damages, and the limitation of damages to Alvarez's time in captivity in Mexico. We reverse and remand the district court's dismissal of the FTCA claims against the United States. We approve the dismissal of Garate. Each party shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FISHER, Circuit Judge, with whom Chief Judge SCHROEDER and Circuit Judges GOODWIN, THOMAS, and PAEZ join, concurring:

I fully concur in the majority opinion, but write separately to articulate another ground on which I base my conclusion that Alvarez's arrest and detention were arbitrary because they were conducted without lawful authority. As the majority opinion explains, whatever power the political branches might have to override the principle of territorial sovereignty, Congress has not expressed its intent to delegate that power to the Drug Enforcement Agency. I would add, moreover, that to the extent the Executive branch has the power to act without congressional sanction, there has been no showing that that power was properly invoked here.

It may well be, as the majority and the dissenting opinions assume, that the Executive—like Congress—has the authority to breach another nation's sovereignty and override other norms of international law, should the need arise. It is evident, however, that neither Congress nor the Executive has expressed an intent to allow sub-Cabinet-level law enforcement officials in the DEA to be the final arbiters of that authority. The President, the Attorney General, the Secretary of State, perhaps the Secretary of Defense, the National Security Advisor—these are the proper Executive branch officials with whom to entrust the weighty decision to kidnap and arrest a suspect on friendly foreign soil. As Judge Gould acknowledges in his dissent, "the capture of a foreign national on foreign soil is no ordinary law enforcement choice; rather, it is a serious foreign policy decision," as evidenced by the international outcry that occurred in the wake of Alvarez's abduction. Such a decision, involving political judgments and national risks of the highest order, is-with all due respect to those involved—well above the paygrade of those who approved the abduction of Alvarez here.

DEA Agent Hector Berrellez made the offer to pay Mexican nationals to apprehend Alvarez in Mexico and deliver him to the United States. Berrellez received authorization to make this offer from his superiors in the Los Angeles office of the DEA and from DEA Deputy Administrator Pete Gruden in Washington, D.C. There is no evidence that anyone ranking higher than the DEA Deputy Administrator or the United States Attorney for the Central District of California explicitly approved the operation.[1]

It seems obvious that such a controversial, risky operation should have been evaluated and approved by the Attorney General personally (or at least by some high-ranking

[1] There are some indications that individuals in the Attorney General's office were informed of the plan. At an evidentiary hearing before the district court on Alvarez's motion to dismiss the indictment in his criminal case, Berrellez testified that he believed that the Attorney General's office had been "consulted" about the operation. *See United States v. Caro-Quintero*, 745 F.Supp. 599, 603 (C.D.Cal.1990). Berrellez did not, however, explain the basis for this belief; nor did he claim that the Attorney General's office gave its approval for the operation upon consulting with the DEA.

The only other evidence suggesting that the Attorney General's office might have been informed of the operation is an anonymous memorandum entitled "Operation Leyenda: Chronology" that the United States produced during discovery. According to the memorandum, whose origin is unclear, the United States Attorney's Office in Los Angeles approved the kidnapping plan, the DEA Administrator was "advised of the general plan, and he in turn advise[d] the Executive Assistant to the Attorney General." However, DEA Administrator John C. Lawn testified at his deposition that he had no advance knowledge of the plan to use Mexican nationals to apprehend Alvarez, and the United States denied Alvarez's request for admission that Lawn approved the operation. The assertions contained in Berrellez's testimony and in the memorandum are therefore unsupported by the evidence. Even if we were to accept the assertions as true, however, they indicate nothing more than that the Attorney General's office had knowledge of the operation. They do not support the further conclusion that the Attorney General explicitly sanctioned Alvarez's extraterritorial abduction.

Department of Justice official authorized to act on the Attorney General's behalf), probably in consultation with the Department of State or the White House Counsel's office. Indeed, Judge Gould's dissent is predicated on the notion that "extraordinary renditions" of suspects from foreign nations are such critical foreign policy decisions that they must be planned and coordinated at the highest levels of government. He would rob this notion of any force, however, by equating the DEA actors here with the upper echelon of the Executive branch.

The *Chen* case illustrates that the decision to engage in extraterritorial operations is beyond the discretion of law enforcement officers. In stark contrast to the abduction of Alvarez, the limited INS operation at issue in *Chen-as* the *Chen* opinion took pains to delineate-was carefully planned and subjected to high-level review and approval at various levels within the Department of Justice:

> On August 21, 1991, the Undercover Operations Review Committee of the United States Department of Justice (Review Committee) authorized the INS agents to proceed with the proposed undercover operation involving the use of the Corinthian in international waters.
>
> . . . .
>
> On August 27, the Review Committee considered a revised plan for the INS's proposed undercover operation. . . . The Review Committee was aware that INS agents would conduct the undercover investigation in international waters when approval was given. The Review Committee guidelines specifically contemplate an INS "undercover operation [that] will be conducted substantially outside the United States." INS Undercover Operation Guidelines at IV.A.(2). The operation was also approved by the United States Attorney for the Central District of California and an Assistant Attorney

> General in the Department of Justice, both of whom knew that the operation would be conducted in international waters.

Chen, 2 F.3d at 332. As we were careful to point out, the INS agents did not act on their own discretion but instead sought approval from numerous Department of Justice officials, "all of whom answer directly to the Attorney General herself." *Id.* at 334.

The logic of the conclusion that federal law enforcement officers must obtain Cabinet-level authorization for making extraterritorial arrests finds persuasive expression, in fact, in a legal opinion issued by the Department of Justice's own Office of Legal Counsel ("OLC"), legal advisor to the Attorney General and to the Executive branch generally. In 1989, Assistant Attorney General William P. Barr addressed the very questions we confront here, but in the context of the FBI's authority "to investigate and arrest individuals for violating United States law, even if the FBI's actions contravene customary international law." 13 U.S. Op. Off. Legal Counsel 163 (1989) ("Barr Opinion"). The Barr Opinion contended—contrary to a previous 1980 OLC Opinion—that the FBI had such authority, either statutorily or at least through the Attorney General. Whatever weight the Barr Opinion merits, it did not endorse the FBI's ability to act on its own authority, but rather cautioned that the FBI may violate international law only "at the direction of the President or the Attorney General." *Id.* at 183. Indeed, the Opinion was even more explicit, and cautionary, in its advice regarding the extent and exercise of authority "to override customary international law" in, for example, forcibly abducting a suspect from another country without that country's consent. *Id.* at 180-81. The Barr Opinion advised in a prescient passage that:

> [W]e believe that the Attorney General has the power to authorize departures from customary or other international law in the course of law enforcement activities and that the President need not personally approve such actions. *We would not recommend, however, that the Attorney General delegate the authority to more subordinate officials.* Even if he is viewed as exercising statutory authority . . . we think that as a prudential matter the Attorney General should, in this case, exercise it personally. Decisions such as *Garcia-Mir [v. Meese*, 788 F.2d 1446 (11th Cir.1986)] rely on the theory that the Executive has the constitutional authority to make political decisions affecting our international relations. To the extent that such decisions are made by officials below cabinet rank, however, the factual basis for this theory may be weaker.
>
> *Specifically, we recommend that any overseas law enforcement activity that presents a significant possibility of departing from customary or other international law be approved directly by the President or the Attorney General.*

Id. at 180 (emphasis added).

Judge O'Scannlain's dissent therefore misses the mark by repeatedly stating that Congress has delegated to the Attorney General the authority to determine whether to enforce our laws extraterritorially. Even if such a delegation has in fact occurred—which has not been demonstrated here—it would be of little import in this case, because there is no evidence that the Attorney General played a role in the decision to abduct Alvarez.

Given the absence of specific approval by the Attorney General or any other Cabinet-level official, Judge O'Scannlain argues that the DEA enjoys the more general statutory authority to make extraterritorial arrests on its own accord. In support of this contention, he relies on *Chen*, claiming that the DEA's authority to act extraterritorially is the same as that

of the INS. The critical distinction, however, is that the Attorney General has explicitly delegated to the INS his broad powers to enforce the immigration laws.[2] *See* 8 C.F.R. § 2.1. In the case of the DEA, the Attorney General has made no such delegation.

Judge O'Scannlain's dissent urges that this lack of an explicit delegation does not matter because Congress has authorized the extraterritorial *application* of the criminal statutes for which Alvarez was charged, and this authorization "would seemingly sanction" the extraterritorial *enforcement* of those statutes. The extraterritorial application and the extraterritorial enforcement of criminal statutes are far from synonymous concepts, however. That Congress may have intended a criminal statute to reach conduct that occurs beyond our borders, and that United States courts would have jurisdiction over such crimes, does not mean that Congress also intended to give law enforcement officers unlimited authority to enforce the statute by entering a foreign nation, uninvited, to abduct a foreign national, in violation of international law. Indeed, that is why we enter into extradition treaties. It is therefore not enough to say, as Judge O'Scannlain contends, that "Congress must have intended to have the laws enforced [extraterritorially] by some member of the Executive branch," for even if Congress did so intend, I cannot conclude that Congress silently designated the DEA officials, rather than the Attorney General, as the Executive branch officials to whom it was entrusting the decision to engage in extraterritorial law enforcement.

In the wake of the brutal murder of DEA Agent Camarena, the Drug Enforcement Administration understandably wanted to capture and punish those who were responsible for the

[2] Moreover, as I explained earlier, the INS agents who planned the operation in *Chen* sought high-level approval from the Department of Justice despite this general delegation of the Attorney General's authority.

death of one of its own. But in the absence of congressional delegation of the authority to override another nation's territorial sovereignty-an absence that the majority opinion has amply demonstrated-the decision to sneak into a friendly nation and abduct one of it citizens, in violation of international law, was not for the DEA to make. That decision belonged to the Attorney General and other members of the Cabinet, if not to the President himself. Because the highest levels of the Executive branch played no role in planning or authorizing Alvarez's abduction, and because Congress has not granted the DEA the more general authority to conduct extraterritorial law enforcement activities, I agree that the arrest and detention of Alvarez were arbitrary because they were not "pursuant to law." Alvarez therefore has established a violation of the law of nations that is actionable under the ATCA.

O'SCANNLAIN, Circuit Judge, with whom Circuit Judges RYMER, KLEINFELD, and TALLMAN join, dissenting:

We are now in the midst of a global war on terrorism, a mission that our political branches have deemed necessary to conduct throughout the world, sometimes with tepid or even non-existent cooperation from foreign nations. With this context in mind, our court today commands that a foreign-national criminal who was apprehended abroad pursuant to a legally valid indictment is entitled to sue our government for money damages. In so doing, and despite its protestations to the contrary, the majority has left the door open for the objects of our international war on terrorism to do the same.[1]

[1] Perhaps cognizant that its analysis cannot bear its own weight if applied more broadly, the majority recites that we need not worry because its holding "is a limited one." *Supra* at 608. Count me, however, among those unassuaged by the majority's assurances. I believe that impermissibly encroaching upon the duties rightfully reserved to the political branches is of serious consequence, and unfortunately such encroachment establishes a very troubling precedent which we will regret. Indeed, the majority's attempt to distinguish the circumstances of this case from other overseas operations conducted by our nation's military and law enforcement personnel may not prove to be so facile. One of the many vexing questions implicated by its opinion, but left unanswered by the majority, is what are we to make of sub-agencies within the Department of Homeland Security, as well as the Federal Bureau of Investigation ("FBI"), the Drug Enforcement Administration ("DEA"), the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), and other law enforcement agents who aid and assist in the war against terrorism and efforts to protect homeland security by capturing known terrorists and criminals in foreign locales across the globe? Unless the majority believes that every use of transborder arrest by the Executive branch falls within "its power to detain under the war powers of Article II," *supra* at 609 (quoting *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir.2003))-which is obviously not the case-no rational observer can honestly say that our court's holding today "is a limited one."

What makes this astounding pronouncement even more perverse is that our court divines the entitlement to recovery from the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, a statute first enacted over 200 years ago by members of the First Congress, many of whom were Framers of our nation's Constitution. With utmost respect to the majority, there is simply no basis in our nation's law for this bewildering result, and the implications for our national security are so ominous that I must dissent.

I

Notwithstanding the majority's lengthy disquisitions concerning various theories and sources of international law, the central issue in this case is very simple: Do American law enforcement agents violate well-established principles of American jurisprudence when they apprehend a duly-indicted suspect outside the confines of our nation's borders?[2] The answer is clearly no; the United States has neither now nor ever agreed to an asserted international law principle prohibiting the practice of transborder abduction.[3]

[2] As an initial matter, I am sympathetic with many of the separation of powers concerns expressed in Judge Gould's separate dissent. Indeed, I share a similar apprehension that the majority's approach could have dire consequences if applied to our nation's current military and law enforcement operations overseas.

However, interestingly enough, the government, neither in its brief on cross-appeal nor its amicus brief, argued for the applicability of the political question doctrine. In any event, under our precedent, I believe that Alvarez, while not entitled to relief, has stated a justiciable claim under the ATCA.

[3] I agree with the majority that Alvarez lacks standing to obtain redress under the ATCA for Sosa's and the DEA agents' alleged infraction against Mexican sovereignty; state-on-state injuries like the one Alvarez alleges here are singularly inappropriate for assertion of third-party rights by foreign citizens.

Moreover, I agree with the majority that Alvarez's claim for transborder abduction must fail. However, because the majority reaches this

The majority, perhaps overlooking the grandeur of the forest while gazing with much admiration at the trees, meanders through various sources which suggest how pleasant it would be if transborder abduction were actionable. However, the majority's searching inquiry into the scope of international law is simply unnecessary. The ATCA is a congressionally enacted statute; accordingly, international law in this context must first and foremost comport with American case law and congressional intent, rather than be defined by the amorphous expressions of other countries or international experts. In other words, no claim can be actionable under the ATCA based on a norm to which the United States itself does not subscribe.

I do not suggest that the majority's inquiry into the status of transborder arrest in the broader international commu nity—which Congress, by enacting the ATCA, has directed us to perform in appropriate cases—is one beyond the federal courts' ability to undertake. Indeed, some areas of substantial international unanimity are easily recognized. *See, e.g., Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig) ("Marcos I)*, 978 F.2d 493, 500 (9th Cir.1992). Nevertheless, I believe that in many cases, as in this one, it will be far easier to determine whether the United States subscribes to a given norm than whether other countries do, and accordingly the former inquiry should appropriately precede the latter.

II

I respectfully suggest that the majority has imprudently ignored the relevant underpinnings of the ATCA. As demonstrated below, a proper historical understanding of the ATCA compels the conclusion that no claim can prevail

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result in a rather circuitous manner, I write separately on this issue to underscore that the United States has neither acquiesced in, nor considers itself bound by, any supposed norm against transborder arrest.

where the United States, through its political branches, does not acquiesce in an international norm.

A

First enacted as part of the Judiciary Act of 1789, the ATCA still reads today almost exactly as the First Congress drafted it; the version currently enshrined in Title 28 provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1994); *see* Judiciary Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 77.

The ATCA was, from the beginning, a curious provision. As one eminent scholar of both federal jurisdiction and American legal history notes, the ATCA was one of only two provisions of the Judiciary Act that "arguably g[a]ve federal courts jurisdiction over judicial matters outside the enumeration of Article III." David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, at 51-52 (1997).[4] Perhaps because of the singular nature of its jurisdictional grant, the ATCA was infrequently used for almost two hundred years, until fairly recently when courts have eagerly exploited the opportunity to revivify it.

In the course of this resurgence of a statutory provision that lay largely dormant since our nation's founding, our court has determined that certain international law principles may be incorporated into federal common law, and thereby into the ATCA as well. *See Hilao v. Estate of Marcos (In re Estate of*

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[4] The other was the Act's apparent provision for general alienage diversity jurisdiction, rather than jurisdiction only over controversies between aliens and U.S. states or citizens, as specified in Article III, Section 2. Currie, *supra*, at 51. The Supreme Court subsequently construed the statute's reference to suits "where an alien is a party" to comprehend only suits "between citizens and foreigners," to conform to the Article III grant. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14, 1 L.Ed. 720 (1800) (emphasis omitted).

Ferdinand Marcos, Human Rights Litig.) ("Marcos IF), 25 F.3d 1467, 1475 (9th Cir.1994). The *Marcos II* court set out the standard for evaluating whether an ATCA plaintiff states a claim: "Actionable violations of international law must be of a norm that is specific, universal, and obligatory." *Id; accord, e.g., Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir.2002); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383-84 (9th Cir.1998).

B

The requirement of "universality" constitutes an insurmountable bar to recovery for transborder arrest.[5] I focus in particular on the corollary of this requirement: a norm of international law not recognized by the United States cannot be deemed a universal one, actionable in this nation's courts.

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[5] Of the elements required for an actionable norm under the ATCA, "specificity" is, appropriately, the clearest of the three. International law from the time of the ATCA's enactment has been somewhat inchoate, and as the number of international agreements, conventions, and organizations has grown, discerning the substance of the law of nations has required rather more than reading the works of Pufendorf, Burlmaqui, and Vattel with which members of the First Congress were presumably familiar. Moreover, the international community whose customs and practices define the law of nations has become larger and more diverse. It is not surprising, therefore, that frequently the propositions capable of attracting the broadest support are also the most diffuse (and thus the least likely to offend). Yet much diplomatic gloss, though possessing great virtue for its significance to the development of the law of nations in the broadest sense, provides no suitable basis for tort litigation.

A "specific" norm, therefore, is one sufficiently "'definable,'" *Marcos II*, 25 F.3d at 1475 (quoting with approval *Ford v. Suarez-Mason*, 672 F.Supp. 1531, 1539-40 (N.D.Cal.1987)), such that its violation can be objectively ascertained. To be sure, the nations of the world need not have commonly agreed upon an exhaustive catalogue of every variation, but the norm itself must have become "clear and unambiguous." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 819-20 (D.C.Cir.1984) (Bork, J., concurring) (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980)) (internal quotation marks omitted).

We have previously noted the importance of determining whether a norm of international law is recognized by the United States. *See Martinez*, 141 F.3d at 1383 ("To determine whether this tort satisfies the requirement for a tort claim under the Alien Tort Act, we must decide '[1] whether there is an applicable norm of international law [proscribing such a tort] . . . *recognized by the United States* . . . and [2] whether [that tort] was violated in [this] particular case.'" (quoting *Marcos I*, 978 F.2d at 502 (alterations in original) (emphasis added))). *Marcos I* did not state this requirement explicitly, but the exposition of the constitutional basis for the ATCA, *see supra* at 612, makes clear that the *Martinez* court correctly recognized that ATCA jurisdiction subsumes it.

Federal common law is a means of preserving a uniform national construction of rights and obligations within a given area of the law even in the absence of a detailed statutory scheme. *See, e.g., Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981). This consideration carries particular force in the foreign policy context in which the ATCA lies; it was passed, let us remember, in 1789, only months after the First Congress convened. The Framers, and presumably those who went on to serve the new government, were acutely conscious of the need for the national government's interpretation of the law of nations to be controlling. *See, e.g., The Federalist No. 3*, at 43 (John Jay), *No. 80*, at 476-77, 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Yet one equally basic characteristic of federal common law is that Congress may supplant it as the rule of decision, because the power to legislate rests most properly with the elected representatives who possess both the greater competence and the greater authority, conferred by the people, to wield it. And the same is no less true with regard to the law of nations as federal common law; indeed, foreign policymaking is essentially confided not merely to the national government writ large,

but to its political branches in particular.[6] E.g., *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948); *Oe jen v. Cent. Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726 (1918); *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964).

The Framers and the First Congress viewed the United States's substantial adoption of the law of nations as furthering their intention that the new nation take its place among the civilized nations of the world. E.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474, 1 L.Ed. 440 (1793) (opinion of Jay, C.J.). Yet they clearly did not mean for the law of nations to act as an irrevocably binding constraint on the law and policy-making authority of the national government. In his last contribution as Publius, John Jay famously recognized the binding nature of treaties, and a number of the Framers shared his view that treaties created a binding obligation on the contracting parties under the law of nations. *The Federalist No. 64*, at 394 (John Jay); *see, e.g.*, Note, *Restructuring the Modern Treaty Power*, 114 Harv. L. Rev. 2478, 2484-90 (2001) (discussing the Framers' views). But the law of nations imposed constraints "in point of moral obligation," not restrictions on national policymakers' power to breach. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272, 1 L.Ed. 568 (1796) (opinion of Iredell, J.). The Framers intended that the United States would have the *power*, if not necessarily the *right* under the law of nations, to violate or even to repudiate aspects of the law of nations, provided it were willing to face

[6] Of course, accepting this principle still leaves open the question of how that responsibility should be allocated *between* the political branches. For present purposes, it is sufficient to say that whatever degree of responsibility the President enjoys vis-à-vis Congress, the political branches collectively enjoy primacy over the judiciary in the management of our foreign relations.

the consequences of its breach, possibly including war.[7] And it was for this reason that the power to violate or to repudiate, like the power over foreign affairs generally, was confided to the national government. *See The Federalist No. 80, supra*, at 476 ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it."). The federal common law's incorporation of the law of nations, in short, is not beyond the political branches' power to alter. And this fact is entirely consonant with the principle, expressed in our cases as elsewhere, that "[c]ustomary international law, like international law defined by treaties and other international agreements, rests on the consent of states." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992); *see id.* ("A state that persistently objects to a norm of customary international law that other states accept is not

[7] *See, e.g.*, Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1568 (1984) ("[E]very State has the power-I do not say the legal right-to denounce or breach its treaties, or to violate obligations of customary international law." "[I]t is inconceivable that the Constitution intended to make it impossible or impermissible-unconstitutional-for the United States to violate a treaty or other international obligation."). One of the handful of cases sustaining ATCA jurisdiction, *Bolchos v. Darrel*, 3 F.Cas. 810 (D.S.C.1795) (No. 1,607), likewise recognizes the power to depart from the law of nations. *See id.* at 811 ("It is certain that the law of nations would adjudge neutral property, thus circumstanced, to be restored to its neutral owner; but the . . . treaty with France alters that law. . . ."). Although the law of nations did not favor the libelant, the *Bolchos* court found in his favor nonetheless because jurisdiction was proper under the ATCA's *treaty* provision and because the treaty in question conferred an enforceable right to sue. *See id.* Despite *Bolchos's* distasteful subject matter-the action was for recovery of a cargo of slaves-the opinion offers some insight into contemporaneous understanding of the law of nations as enforced by the ATCA.

bound by that norm . . . ." (citing Restatement (Third) of the Foreign Relations Law of the United States [hereinafter Restatement] § 102 cmt. d)).

Therefore, where the political branches have exercised their power to diverge from the course that others see the law of nations as setting, ATCA liability cannot lie. The ATCA's conformity with Article III rests on the incorporation of the law of nations as federal common law—particularly in a case like this one, where neither alienage, nor admiralty, nor any of the other headings of Article III provides a basis for federal jurisdiction. It is for this reason that an ATCA plaintiff relying on the law of nations (as opposed to a treaty) must allege a tort that violates some norm of international law recognized by the United States.

At least one of the few Supreme Court opinions to consider the ATCA directly appears to have recognized as much. In *O'Reilly De Camara v. Brooke*, 209 U.S. 45, 28 S.Ct. 439, 52 L.Ed. 676 (1908), Justice Holmes wrote for a unanimous Court in affirming the dismissal of an ATCA complaint that alleged the tortious destruction of a hereditary title during the Spanish-American War. *Id.* at 48-49, 28 S.Ct. 439. Although the Court did not directly decide whether the plaintiff had alleged a tort cognizable under the ATCA, *see id.* at 52-53, 28 S.Ct. 439, it did make the following comment on that question: "[W]e think it plain that where, as here, the jurisdiction of the case depends upon the establishment of a 'tort only in violation of the law of nations, or of a treaty of the United States,' it is impossible for the courts to declare an act a tort of that kind when the Executive, Congress, and the treaty-making power all have adopted the act." *Id.* at 52, 28 S.Ct. 439.

Such analysis fits with our case law's incorporation of the requirement that an actionable norm of international law be "universal." The case at hand does not require us to delineate the bare minimum level of acceptance that would constitute

"universality"; instead, it invokes the simple proposition, stated explicitly in *Martinez* and implicitly in other cases, that in determining whether a norm is "universal," the United States is to be counted as a part of the universe. A norm to which the political branches of our government have refused to assent is not a universal norm. It is not the judiciary's place to enforce such a norm contrary to their will.[8]

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[8] The final requirement under our law is that an actionable norm be "obligatory." Our cases have used this term to mean "binding" rather than merely "hortatory." *Marcos II*, 25 F.3d at 1475 (quoting with approval *Forti*, 672 F.Supp. at 1539-40). Binding norms "confer [ ] fundamental rights upon all people vis-a-vis their own governments." *Id.* at 1475-76 (quoting *Filartiga*, 630 F.2d at 885) (alteration in original) (internal quotation marks omitted). Sosa and the DEA agents argue that the class of obligatory norms is further restricted to those that are obligatory in the literal sense, i, *e.*, those that nation-states *must* obey. In the parlance of international law, such a norm falls under the heading of *jus cogens*.

This argument is not without support in the case law. Courts applying *Marcos II's* tripartite standard have debated whether the only "obligatory" norms whose violation is actionable under the ATCA are those that have attained *jus cogens* status, and indeed, some have adopted the position that the defendants urge. *Compare, e.g., Nat'l Coalition Govt of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 345 (C.D.Cal.1997) ("[A] foreign sovereign's expropriation of its national's property does not constitute a jus cogens violation of the law of nations and, therefore, is not cognizable under § 1350."), *Xuncax v. Gramajo*, 886 F.Supp. 162, 184 (D.Mass. 1995) ("These qualifications essentially require that . . . the prohibition against [the act in question be] non-derogable and therefore binding at all times upon all actors."), *and Beanal v. Freeport-McMoRan Copper & Gold, Inc.*, 969 F.Supp. 362, 370 (E.D.La.1997) (citing *Xuncax*), *aff'd*, 197 F.3d 161 (5th Cir.1999), *with Doe v. Unocal Corp.*, 110 F.Supp.2d 1294, 1304 (C.D.Cal.2000) ("While the Ninth Circuit has not expressly held that only jus cogen *[sic]* norms are actionable, the Circuit's holding in *Estate II* that actionable violations are only those that are specific, universal, and obligatory is consistent with this interpretation."), *and In re World War II Era Japanese Forced Labor Litig.*, 164 F.Supp.2d 1160, 1179 (N.D.Cal.2001) ("It remains unclear, however, whether all jus cogens norms meet the 'specific, universal and obligatory standard' required to be actionable under section 1350."), *with Mehinovic v.*

C

The majority fails to take into account these fundamental principles, which invoke the historical understanding in which the ATCA was passed and the proper role of the political branches in determining our nation's actions as they relate to national security. As a result, the majority's analysis of the status of transborder arrest as an instrument of law enforcement-which has great bearing on its treatment of Alvarez's alternative claim for relief for arbitrary arrest is seriously flawed because it ignores the baseline proposition that it is easier for this court to determine whether the United States agrees with a norm than to determine whether a preponderance of the world's other nations does.

Let us recall the particular circumstances of the case at hand. Alvarez was charged in 1990 with, among other offenses, the kidnaping[9] and felony murder of a federal agent in violation of 18 U.S.C. §§ 1114(1) and 1201(a)(5). *See, e.g., Alvarez-Machain II*, 504 U.S. at 657 n. 1, 112 S.Ct.

Vuckovic, 198 F.Supp.2d 1322, 1344 (N.D.Ga.2002) (*"A jus cogens* violation satisfies, but is not required, to meet [the 'specific, universal, and obligatory'] standard.").

However, we need not decide whether the term "obligatory" necessarily means that *a jus cogens* norm is required. Our prior cases have left this question open. And despite the majority's assertion to the contrary, this case does not require us to pronounce defmitively on the relevance of the distinction between *jus cogens* and mere customary international law. If Alvarez in fact alleges violations of *a jus cogens* norm, as did the plaintiffs in the Marcos litigation, or if he alleges violations of a derogable norm to which the United States does not subscribe, we may bypass the significance of *jus cogens* status. The distinction would be significant only if Alvarez alleges violations of a norm that is recognized by the United States-and therefore incorporated into the federal common lawbut lacks the universal acceptance within the international community that is the *sine qua non* of *a jus cogens* norm.

[9] A 1994 amendment added a second "p" to the term, which now lists the crime as "kidnapping."

2188. The kidnaping statute appears to contemplate the exercise of federal criminal jurisdiction over certain defendants who are neither Americans nor found in the United States. *See* 18 U.S.C. § 1201(e) (2000) (authorizing the exercise of jurisdiction over defendants if they are American nationals, if they are found in the United States, *or* "if the victim is a representative, officer, employee, or agent of the United States"). Notwithstanding the majority's assertions to the contrary, the general statutes governing the operation of the Drug Enforcement Administration confer on DEA agents the authority to "make arrests without warrant ... for any felony, cognizable under the laws of the United States, if [an agent] has probable cause to believe that the person to be arrested has committed or is committing a felony." 21 U.S.C. § 878(a)(3) (2000). DEA agents may also "perform such other law enforcement duties as the Attorney General may designate." *Id.* § 878(a)(5).

This statutory framework confers on the DEA agents the same degree of authority to act extraterritorially that we have previously held INS agents to possess. *See United States v. Chen*, 2 F.3d 330 (9th Cir.1993). In *Chen*, we considered whether the INS was authorized to conduct criminal law enforcement activity outside the United States. We held that "Congress need not confer such authority *explicitly* and *directly* on the INS agents themselves." *Id.* at 333. We inferred from Congress's broad grant of authority to the Attorney General to enforce the immigration laws,[10] and from the extraterritorial applicability of those laws, that the enforcement power extended where the laws themselves extended. *See id.* at 333-34.

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[10] She had in turn delegated that authority to the Commissioner of Immigration and Naturalization, who in turn delegated it to rank-and-file INS agents. *Chen*, 2 F.3d at 334 (citing 8 C.F.R. § 2.1 (1991)).

Faced with our holding in *Chen*, Alvarez argues, and the majority erroneously agrees, that the criminal context presented in this case is distinguishable from the unique context of border security at issue in *Chen*. Yet the statutes at issue here bear just as directly on national security, particularly insofar as they relate to and promote the federal government's ability to enforce the drug laws, and to protect the agents who carry out that enforcement, no matter on which side of the border they may be threatened. And so our cases have recognized. "Our circuit has repeatedly approved extraterritorial application of statutes that prohibit the importation and distribution of controlled substances in the United States because these activities implicate national security interests and create a detrimental effect in the United States." *United States v. Vasquez-Velasco*, 15 F.3d 833, 841 (9th Cir.1994). As we stated in another prosecution arising from the Camarena abduction and murder: "We have no doubt that whether the kidnapping and murder of [DEA] agents constitutes an offense against the United States is *not* dependent upon the locus of the act. We think it clear that Congress intended to apply statutes proscribing the kidnapping and murder of DEA agents extraterritorially." *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir.1991).

Applying the reasoning of *Chen* to the statutes that protect American drug enforcement personnel leads to the inescapable conclusion that Congress has authorized federal agents enforcing those statutes to make warrantless arrests beyond our borders-a conclusion at odds with the argument that the United States respects a norm prohibiting transborder arrests.

Moreover, such a norm, which would render a transborder arrest violative of the law of nations absent the host country's consent, does not seem tenable either as a matter of statutory construction or as a reflection of Congress' likely goal. I can conceive of a number of situations in which the nature of the

host country's government, or even the utter nonexistence of a functioning government, *precludes* obtaining the formal sanction of the local judiciary or of the host country. Indeed, in the months since September 11, 2001, the United States government has retrieved a number of individuals from lawless locales of this sort. *See, e.g., Al Odah v. United States*, 321 F.3d 1134 (D.C.Cir.2003). Therefore, the statutory authorization to make arrests overseas for violations of extraterritorially applicable law runs contrary to an alleged prohibition on transborder arrests.

It is true that in a number of other cases dealing with transborder arrests, the nation in which the arrest occurred did not object, even if it did not cooperate. While Mexico, by contrast, clearly and consistently protested Alvarez's seizure, it does not follow that the United States was obliged to comply with the processes of Mexico's judicial system.

One highly visible abduction, that like the case at hand also involved the extraterritorial enforcement of our nation's drug laws, refutes the notion that the United States has somehow divested itself of the authority to engage in transborder arrest without the consent of the host country. *United States v. Noriega*, 117 F.3d 1206 (11th Cir.1997), of course, dealt with the arrest of Panama's former strongman on drug-related charges. *Id.* at 1209-10.[11] Noriega was functioning "as the

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[11] For purposes of further illustration, I refer to the recent case of *Kasi v. Angelone*, 300 F.3d 487 (4th Cir.2002). Mir Aimal Kasi on the morning of January 25, 1993, stopped his automobile behind a line of automobiles outside of CIA headquarters in Fairfax County, Virginia, emerged from his vehicle, and opened fire on the other drivers with an AK-47 assault rifle. Two CIA employees were killed, and three other employees were wounded. Kasi fled to his home country of Pakistan the day after the shootings in order to avoid arrest. On February 16, 1993, Kasi was indicted for the various crimes that he had committed. For the next four and one-half years, Kasi remained at-large, traveling in Afghanistan and returning to Pakistan only for brief visits. Then, on June 15, 1997, FBI agents located and abducted Kasi from a hotel in

de facto, if not the *de jure*, leader of Panama" when the American military incursion to seize him occurred. *Id.* at 1211. Surely any protest from a Panamanian government controlled by Noriega himself could be disregarded, could it not, particularly if, as a matter of law, Noriega had forfeited his head-of-state immunity? *See id.* at 1212. Moreover—and herein lies the rub-the United States had consistently refused to acknowledge the legitimacy of Noriega's rule from its inception, which was after his indictment but well before the effort to retrieve him was ordered. *Id.* at 1209-10.

Therefore, irrespective of what various international law scholars and others may deem as advisable policy, these ruminations are of little consequence under the ATCA when the political branches of the United States have firmly decided on a course of action. Examining the relevant statutes, the actions of the political branches in other circumstances, and as discussed by the majority, the manner in which the President and the Senate have exercised the treaty power in this area, *see supra* at 618-619, leads to only one conclusion: The United States does not, as a matter of law, consider itself forbidden by the law of nations to engage

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Pakistan. Two days later, Kasi was transported back to Fairfax Country, Virginia and handed over to state authorities for prosecution. Kasi was eventually convicted and sentenced to death for his crimes. In response, therefore, to the majority's assertion that not "every executive branch decision to breach an international norm translates into a more global repudiation of that norm," *supra* at 620 n. *15*, *Kasi*, *Noriega*, and *Chen*, as well as the recent capture of terrorists all across the globe, *see, e.g.*, *Al Odah v. United States*, 321 F.3d 1134 (D.C.Cir.2003), are merely a few examples that demonstrate the consistent refusal of the political branches of this nation's government to adhere to a prohibition against transborder arrests. Consequently, the ATCA should provide no monetary relief to those criminals and terrorists captured pursuant to this valid tool of national security.

in extraterritorial arrest, but reserves the right to use this practice when necessary to enforce its criminal laws.[12]

III

If the majority had merely denied Alvarez's claims based on its exposition of international mores, I would be troubled by its failure to engage in a review of both the history behind

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[12] Because the prohibition on transborder arrest is not accepted by the United States and thus is not actionable under the ATCA, it is unnecessary to consider whether, as Sosa and the DEA agents urge, it is not actionable for the additional reason that it does not rise to the level *of jus cogens*.

However, it should be noted that no court, convention, declaration, or authority such as the Restatement has identified transborder abduction as a *jus cogens* norm. Rather *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), *Alvarez-Machain II*, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992), and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) indicate the opposite. *See United States v. Matta-Ballesteros*, *71* F.3d 754, 763 n. 5 (9th Cir.1995) (kidnaping does not violate recognized constitutional or statutory provisions in light *of Alvarez-Machain II*, and also does not qualify as *a jus cogens* norm such that its commission would be justiciable in our courts even absent a domestic law). Indeed, on remand in this case, we made it clear that there was no due process violation-put differently, that kidnaping isn't shocking-because it cannot be so fundamental as to constitute *a jus cogens* norm. *Alvarez-Machain III*, 107 F.3d 696, 702 (9th Cir.1997).

The Restatement, for example, has identified only torture, genocide, slavery, murder, prolonged arbitrary detention, and systematic racial discrimination. Neither do the conventions and declarations upon which Alvarez relies establish universal acceptance. The International Covenant on Civil and Political Rights was signed and ratified in 1992 but with the understanding by the Senate and Executive Branch that Articles 9 and 10 are not self-executing and may not be relied on by individuals; the American Convention on Human Rights has not been ratified; the Universal Declaration *of* Human Rights and the American Declaration *of* the Rights and Duties *of* Man are not binding legal obligations. None prohibits forcible abduction. Nor does it suffice to rely on general principles such as "rights to freedom *of* movement, to remain in one's country, and security in one's person."

the ATCA and the manner in which the political branches have exercised the option of transborder arrest in varied circumstances. But at least I would feel secure that we as judges had not improperly encroached upon the duties reserved for the political branches in formulating our nation's foreign policy. Most regrettably, by providing relief to Alvarez on his claim of prolonged arbitrary arrest, our court has in effect restricted the authority of our political branches, and it has done so in a way that finds no basis in our law.

A

The parties do not dispute that the prohibition on prolonged arbitrary detention is actionable under the ATCA. *See Martinez*, 141 F.3d at 1383-84. Nevertheless, the question remains whether the prohibition was violated in this case.

B

Notwithstanding its express recognition that the criminal statutes covering kidnaping, felony murder, and the other crimes involved in this case extend to conduct outside of the borders of the United States, the majority deems the government's action as "arbitrary."

The majority, although not expressly stating it as such, seems most troubled by the lack of Mexican authority for Alvarez's arrest. Indeed, imagine that the DEA had communicated with the Mexican government prior to seizing Alvarez and that such dialogue led to Mexican authorities assisting in the arrest, or acknowledging consent to the DEA's actions in some other manner. Under the majority's proffered approach the United States would be forced to compensate an alleged foreign-national criminal for "arbitrary arrest" within the meaning of the law of nations merely because the "wrong" Executive agency spearheaded the operation.

If Mexico had indeed sanctioned its actions, our court would not be subjecting the DEA to liability for successfully

negotiating via diplomatic means the capture of a wanted criminal. Or would it? This simple hypothetical, however, underscores the fallacy of the majority's approach. Whether the United States procured an arrest warrant through the Mexican judiciary should not affect our analysis, because the availability of local process is extremely sensitive, bound up with important foreign policy considerations that are confided to the political branches in general and to the Executive in particular. Indeed, the majority elsewhere recognizes that "an individual's right to be free from transborder abductions has not reached a status of international accord sufficiently to render it 'obligatory' or 'universal,' [and therefore] cannot qualify as an actionable norm under the ATCA." *Supra* at 620.

Nevertheless, seemingly under the majority's approach, such extraterritorial arrest authority may still be subject to a requirement that any agents exercising it on foreign soil—s opposed to the high seas, as was the case in *Chen*, 2 F.3d at 332—btain the consent or assistance of the host country. The majority, in a rare moment of restraint, does recognize the "powers of the political branches to override the principles of sovereignty in *some* circumstances, should the need arise." *Supra* at 629 (emphasis added). However, the "need" to engage in transborder arrest without the prior consent of a foreign nation should appropriately be left to the discretion of the political branches.

Indeed, the federal courts are not charged with determining the legitimacy of another nation's government. Yet this is essentially what the majority would have us do. Under its approach, the United States would have departed from the ostensibly black-and-white approach that sanctions transborder arrests when employed by our nation's political branches. In its place, a decision to make a transborder arrest would only be permissible when the host country's system of government absolutely requires it, as determined by this

country's courts through the medium of ATCA litigation. As judges, we would have to determine whether a nation's courts are open and functioning; whether it has a legitimate government that can be consulted for permission to seize a suspect; if there are multiple contenders, *see, e.g., Noriega*, 117 F.3d at 1209-10, to which one such a request must be addressed; and so on. Courts are quite unsuited to undertake such analyses, and, indeed, to do so would bring us perilously close to trenching on the power of diplomatic recognition that Article II, Section 3 places at the core of the Executive's foreign affairs authority. *See, e.g., Guaranty Trust Co. v. United States*, 304 U.S. 126, 137-38, 58 S.Ct. 785, 82 L.Ed. 1224 (1938); *Oe jen*, 246 U.S. at 302-03, 38 S.Ct. 309.

I am simply not prepared to declare that Congress intended that any alien charged with a crime, under extraterritorially applicable U.S. criminal law, could remain in a country that refuses extradition. Congress has authorized the arrest, without warrant, of aliens for whom there is probable cause to suspect violation of an extraterritorially applicable statute. In so doing, Congress has left to the Executive, which already possesses the general responsibility for deciding both when and whether to arrest and to prosecute and how best to conduct the nation's foreign relations, the burden of determining when the national interest requires bypassing diplomatic channels to secure such arrest. As the Supreme Court has held in another context, "Situations threatening to important American interests may arise half-way around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275, 110 S.Ct. 1056, 108 L.Ed.2d 222(1990).

C

Turning now to its proffered reason for granting Alvarez redress under the ATCA, the majority claims there was "no basis [under United States] law for the DEA's actions." *Supra* at 631.

1

The majority reaches this extraordinary result even though it concedes that the United States has reserved for itself the authority to arrest criminals and terrorists abroad as a valid law enforcement technique, and that Congress has explicitly extended the reach of criminal statutes for which Alvarez was charged to apply to conduct outside of the nation's borders. Even more astonishing is that the majority bases its holding on the premise that the DEA's actions were "arbitrary" within the meaning of the law of nations because they were beyond the scope of authority conferred by Congress.

In this case, Alvarez was arrested pursuant to an American warrant, issued following his indictment by a federal grand jury on felony charges. He was held overnight and then brought to the United States, where he was promptly placed in federal custody and was arraigned as soon as his medical condition permitted. The majority fails to explain adequately how an arrest supported by probable cause and ordered by a warrant, leading to a brief period of confinement before transfer to custody on American soil with all its attendant legal process, rises to the level of arbitrary detention merely because a parallel warrant was not obtained from the harboring state.

This view does not necessarily render such a seizure legal in every respect; we are limited here to the question whether the arrestee can recover in tort under the Alien Tort Claims

Act, which presupposes a violation of the law of nations.[13] Whatever false arrest claim Alvarez might have, he has not stated a violation of the law of nations to which we adhere.

2

In any event, contrary to the majority's surmise, the DEA was well within its delegated powers when arresting Alvarez. The relevant statutory provisions confer on DEA agents the authority to "make arrests . . . *for any felony*, cognizable under the laws of United States" and the added authority to "perform such other law enforcement duties as the Attorney General may designate." 21 U.S.C. § 878(a) (emphasis added). Because it is undisputed that Congress has authorized the extraterritorial application of the criminal statutes for which Alvarez was charged, *see supra* at 624, this broad legislative delegation of enforcement powers to the DEA would seemingly sanction the extraterritorial arrests at issue in this case.

Nevertheless the majority would narrow this broad delegation of enforcement power and restrict the DEA's authority to engage in transborder arrests because it concludes that it would be "anomalous" for Congress to confer a similar degree of authority to "any State or local law enforcement

[13] It is important to note that Alvarez did bring a number of other claims which, if proven, might well have been cognizable-under the ATCA or otherwise. He alleged that he suffered cruel and degrading reatment, that he was subjected to assault and battery, that his captors had intentionally inflicted emotional distress. The district court took several of these claims to trial and resolved each of them in Sosa's favor, finding that Alvarez was not credible. The only ATCA claims that survived for appeal were those relating to the undisputed fact of Alvarez's seizure, not his allegations of abuse, torture, or mistreatment. But in the appeal before us, it is clear that the mere fact of a transborder arrest without the host country's consent is not actionable under the ATCA, absent a substantiated claim of mistreatment that independently violates aspects of the law of nations that the United States recognizes.

officer designated by the Attorney General." *Supra* at 626-627. However, there is nothing "anomalous" about the legislative branch delegating to the Attorney General to determine in his best judgment whether non-federal law enforcement agents can aid in the application and enforcement of this nation's criminal laws extraterritorially. Instead, Congress engaged in such a broad delegation of law enforcement authority to the DEA and to the Attorney General in order to allow the Executive branch to have the widest array of enforcement options at its disposal.

In addition to the clear language of 21 U.S.C. § 878(a), this court's statutory interpretation is guided by the Supreme Court's recognition that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Furthermore, "[d]elegation of foreign affairs authority is given even broader deference than in the domestic area." *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438 (9th Cir.1996). "Congress-in giving the Executive authority over matters of foreign affairs-must of necessity paint with a brush broader than it customarily wields in domestic areas." *Id.* (quoting *Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965)).

Nevertheless, the majority claims there is an utter void of authority for the DEA's actions. The majority is undeterred by the fact that Congress has authorized the extraterritorial application of the criminal statutes involved in this case and has delegated broad powers of enforcement to the DEA "for any felony, cognizable under the laws of the United States." The majority's holding flies in the face of the clear statutory language enacted by Congress as well as the principle of statutory construction that delegations to the Executive branch are entitled to greater judicial deference in matters involving politically sensitive foreign affairs.

Furthermore the majority's approach leads unavoidably to the following question: if Congress through enactment of 21 U.S.C. § 878(a) has not in fact authorized the DEA and Attorney General to enforce extraterritorially the criminal laws for which Alvarez was charged, to whom exactly has Congress delegated this enforcement authority? By extending the reach of our criminal laws to apply to conduct outside of the nation's borders, Congress must have intended to have the laws enforced by some member of the Executive branch.[14]

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[14] In a separate concurrence, Judge Fisher seemingly concedes that Congress has authorized the Executive branch to engage in extraterritorial law enforcement activities, but nonetheless divines that such decisions have to be made by the "President, the Attorney General, the Secretary of State, perhaps the Secretary of Defense, the National Security Advisor." *Supra* at 642 (Fisher, J., concurring). However, in matters of foreign affairs, nation-states are often intentionally guarded as to precisely which government officials authorize and possess knowledge of covert operations. Furthermore, regardless of whether it is desirable public policy to require high-ranking officials to admit their participation in complex international operations in order to shield the United States and its "sub-Cabinet-level enforcement officials" from liability under the ATCA, there is simply no basis in the Constitution, existing statutes, or our case law for such a legal conclusion.

Judge Fisher tries to find support for his position from a 1989 advisory opinion issued by an attorney in the Department of Justice's Office of Legal Counsel. This advisory opinion expressly recognized the authority of the Attorney General to depart from the norms of international law in the course of law enforcement activities, even without the approval of the President. The opinion then "recommend[s], however, that the Attorney General [not] delegate the authority to more subordinate officials." *Supra* at 642 (Fisher, J., concurring).

As a matter of public policy, this advisory opinion may be of interest to show how the Executive branch might exercise the discretion conferred to it by Congress to engage in extraterritorial law enforcement activities. But such an advisory opinion, of course, neither constitutes binding law nor justifies the newly minted judicial constraints proposed by Judge Fisher to be imposed upon the Executive branch for conducting foreign affairs.

Under the majority's approach, this nation would be left to the whims of foreign countries in enforcing its laws because Congress, in delegating broad law enforcement powers to the Executive branch, did not redundantly recite that extraterritorial enforcement is to be included.[15]

3

Both the statutory structure and our own precedent indicate that the criminal provisions in question apply extraterritorially. Correspondingly, the statutes and precedent also indicate that Congress has authorized their extraterritorial enforcement. Under such circumstances, we are not free to conclude that the political branches have bound themselves—or, to be more precise, have bound the Executive—to the mast. And the prospect of international opprobrium is not sufficient for us as judges to impose a constraint the political branches have not.[16]

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[15] While today's holding may seem innocuous with regard to Mexico, "an important ally and trading partner," the current war on terror in Afghanistan and in other countries, *Kasi*, and *Noriega* are but a few examples that illustrate that such an approach would unduly interfere with the Executive branch's ability to carry out its prescribed duties regarding law enforcement and national security.

[16] The majority also concludes, as to Alvarez's Federal Tort Claims Act ("FTCA") claims, that the DEA agents authorized a false arrest against Alvarez. That Congress intended several of the federal statutes that Alvarez was charged with violating to be both applicable and enforceable beyond the borders of the United States, effectively begins and ends this inquiry. The federal officers were authorized by statute to make warrantless arrests. And the provision in Rule 4(d)(2) of the Federal Rules of Criminal procedure that a "warrant may be executed . . . at any place within the jurisdiction of the United States"—a provision that, when adopted, was intended to *broaden* the territorial scope of a federal court's power to issue process, *see* Fed.R.Crim.P. 4 advisory committee's note—does not preclude federal authorities from obtaining an arrest outside the United States when Congress has authorized them to enforce an extraterritorially applicable statute beyond the national borders.

IV

Dr. Alvarez's capture and delivery to the United States may have offended the sensibilities of some members of our court. As a matter of public policy, such actions may even be worthy of the condemnation that certain pundits and foreign countries, as cited by the majority, have bestowed. But we are not asked in this case to condemn or to condone the federal government's actions; we are asked to compensate Dr. Alvarez in tort under the law of nations. The decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches to make. They, unlike the courts, may be held accountable for any whirlwind that they, and the nation, may reap because of their actions. By its judicial overreaching, the majority has needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security. After today's ruling, if the political branches are intent on protecting the security interests of our nation by arresting and prosecuting those who would do the country harm, Congress and the President should also ensure that the United States Treasury is well-stocked to compensate the captured miscreants.

In light of the statutory authority under which the agents secured Alvarez's arrest in Mexico, the contention that their action was compensable in tort under the FTCA must fail. The district court did not err in granting summary judgment to the United States on the FTCA claims.

GOULD, Circuit Judge, dissenting:

I respectfully dissent because this case presents a non-justiciable political question requiring scrutiny of an executive branch foreign policy decision. The majority passes judgment on an executive branch decision to act against foreign nationals on foreign soil in a matter directly affecting the United States's relations with a foreign nation.[1] Because our Constitution entrusts the conduct of our nation's foreign policy to Congress and to the executive branch, this case poses a political question decidedly inappropriate for judicial review.

The Supreme Court has held that certain allegations of illegal government action should not be ruled on by the federal courts even though all jurisdictional requirements are met. The Court has said that decision in these areas should be left to the politically accountable branches of government, the executive branch and Congress. The reasons for this political question doctrine have been variously described,[2] but, at its core, the political question doctrine represents the judiciary's wise recognition that the structure of our Constitution, its separation of powers, requires judicial restraint when certain subjects are at issue.

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[1] Alvarez's apprehension by Mexican nationals was directed by the Drug Enforcement Administration (DEA), acting under authority delegated from the Attorney General.

[2] The political question doctrine minimizes judicial intrusion into the operations of the other branches of government. *See Gilligan v. Morgan*, 413 U.S. 1, 7, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973). It limits the courts' role in a democratic society. Alexander Bickel, *The Least Dangerous Branch* 184 (1962). It preserves the courts' legitimacy. *Baker v. Carr*, 369 U.S. 186, 267, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (Frankfurter, J., dissenting). And it allocates decisions to the branches of government that have superior expertise. *See* Fritz Scharpf, *Judicial Review and the Political Question: 4 Functional Analysis*, 75 Yale L.J. 517, 567 (1966).

The Supreme Court in *Baker v. Carr* made the classic statement of the considerations that animate the political question doctrine:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or an unusual need or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The Court held that any one of the above-listed characteristics may be sufficient to preclude judicial review. *Id.*

Most significantly for this case, the Court has held that the considerations described in *Baker v. Carr* bar judges from reviewing the executive branch's foreign policy decisions:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.

Chicago & S. Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948). *See also Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309,

62 L.Ed. 726 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislat[ure,] 'the political' Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315, 57 S.Ct. 216, 81 L.Ed. 255 (1936) (holding nonjusticiable the question of the legality of a congressional resolution because "[t]he whole aim of the resolution [was] to affect a situation entirely external to the United States, and falling within the category of foreign affairs"). In other words, judges should not interfere in the management of our nation's foreign policy by opining (as the majority opines) on the executive's foreign policy decisions.

The DEA officials' decision to abduct Alvarez from Mexico without the Mexican government's permission was an executive foreign policy decision. Soon after a federal grand jury indicted Alvarez for murder, DEA officials negotiated with Mexican government officials for Alvarez's capture. When those negotiations proved unsuccessful, DEA officials decided it would be in the United States's interest to accomplish Alvarez's capture by means other than extradition. The officials' decision was consistent with a United States policy, formally announced in 1989, that it was permissible for law enforcement agencies such as the DEA to apprehend individuals accused of violating United States criminal law in foreign states without the consent of the foreign state. Barry E. Carter & Phillip R. Trimble, *International Law* 794 (3d ed. 1999).

The foreign-policy nature of the DEA officials' decision to order Alvarez's capture in Mexico is amply demonstrated by the world's response to the incident. Mexico requested an official report on the role of the United States in the abduction and later sent diplomatic notes of protest from its embassy to the United States Department of State. Mexico

also requested the arrest and extradition of the American law enforcement agents allegedly involved in the abduction. After the United States Supreme Court declined to invalidate Alvarez's capture, twenty-one member states of the Ibero-American Conference argued before the United Nations General Assembly that the extraterritorial exercise of criminal jurisdiction through the use of unilateral measures of coercion, such as abductions, violates the law of nations. Virginia Morris & M.-Christiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Forty-Eighth Session of the UN General Assembly*, 88 Am. J. Int'l L. 343, 357 (1994). The Iranian Parliament passed a draft law giving the president of Iran the right to arrest Americans who take action against Iranian citizens or property anywhere in the world and to bring them to Iran for trial. Carter and Trimble, *supra*, at 794. The Canadian Minster of External Affairs told the Canadian Parliament that any attempt by the United States to kidnap someone in Canada would be regarded as a criminal act and a violation of the U.S.-Canada extradition treaty. *Id.* at 792. The lower house of Uruguay's parliament voted that the United States's policy of unilaterally abducting foreign nationals showed "a lack of understanding of the most elemental norms of international law, and in particular an absolute perversion of the function of extradition treaties." *Id.* The presidents of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay issued a declaration expressing their concern. *Id.* These are only a few of the dozens of acts of diplomatic protest to the United States's policy of extra-territorial abduction, of which Alvarez's capture was the first well-publicized example.

The international response to Alvarez's capture was predictable, and executive officials may well have weighed it in determining whether to order that action. If the capture were merely an "exercise of the executive's law enforcement powers," as the majority suggests, rather than a foreign policy decision, the capture would not have become an international

diplomatic incident. Indeed, the foreign-policy ramifications of international abduction have been well-known for decades, at least since the United Nations Security Council determined in 1960 that Israeli agents' abduction of the Nazi war criminal Adolf Eichmann from Argentina violated that country's sovereignty. Mary Alice Kovac, *Apprehension of War Crimes Indictees: Should the United Nations' Courts Outsource Private Actors to Catch Them?*, 51 Cath. U.L. Rev. 619, 631 (2002).

The foreign-policy nature of the decision to capture Alvarez is also demonstrated by the executive branch's policies governing this type of arrest. Executive branch officials have told Congress that agents follow

> procedures designed to ensure that U.S. law enforcement activities overseas fully take into account foreign relations and international law. These procedures require that decisions as to extraordinary renditions from foreign territories be subject to full inter agency coordination and that they be considered at the highest levels of the government.

Carter and Trimble, *supra*, at 794. The Department of Justice has codified these special foreign-policy procedures in its United States Attorneys' Manual:

> Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators) by means of *Alvarez-Machain* type renditions without advance approval by the Department of Justice. Prosecutors must notify the Office of International Affairs before they undertake any such operation.

Department of Justice, *United States Attorneys' Manual*, § 9-15.610 (1997). These executive branch procedures

demonstrate that the capture of a foreign national on foreign soil is no ordinary law enforcement choice; rather, it is a serious foreign policy decision.

The DEA officials' decision to order the capture of a foreign national on foreign soil involved delicate foreign policy questions: Did the need to prosecute Alvarez for the torture and murder of an American official justify the United States's taking actions that might offend Mexico's government? Did the desire to send a tough message to foreign governments and drug cartels[3] justify the United States's taking actions that might offend other nations' conceptions of international law? Did the benefits to the United States of ordering Alvarez's capture outweigh any potential diplomatic or trade retaliation Mexico might take?

These questions, and other questions DEA officials may have considered (some of them beyond a judge's imagining), are beyond the competence and jurisdiction of federal judges. Unlike DEA officials, federal judges do not negotiate with foreign officials on behalf of the United States. Federal judges do not seek to influence foreign governments to accomplish the United States's policy objectives. Federal judges do not specialize in combating the international drug trade. Federal judges do not routinely work with the State Department. Federal judges do not commonly maintain relationships with overseas officials. Federal judges do not possess special training or knowledge relevant to drug interdiction on foreign soil.

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[3] Alan J. Kreczko, then Deputy Legal Adviser to the State Department, told Congress that some foreign governments "noted in private that [the United States policy of apprehending criminals overseas] will cause narcotics traffickers to have an increased fear of apprehension by the United States." Carter and Trimble, *supra*, at 794. Executive officials may have weighed this potential benefit to the United States when deciding whether to order Alvarez's capture on Mexican soil.

Despite these deficits, the majority passes judgment on the executive branch's conduct of its constitutionally assigned responsibility. In doing so, the majority interferes with a delicate and complex decision "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Waterman*, 333 U.S. at 111, 68 S.Ct. 431. *See also Baker*, 369 U.S. at 211, 82 S.Ct. 691 (noting that foreign policy issues "frequently turn on standards that defy judicial application or involve the exercise of a discretion demonstrably committed to the executive or legislature").

The majority's decision injects a new and worrisome factor into executive officials' foreign policy calculus. Executive officials now must consider not only the international implications of their decisions, but also the possibility that federal judges, and eventually juries,[4] will disapprove of their management of the nation's foreign policy. When executive officials consider whether to order action on foreign soil, they should properly weigh the possibility of diplomatic protests, international friction, and trade sanctions. They should *not* be required also to weigh the possibility of tort lawsuits by foreign nationals seeking punitive damages in their own nation's courts. They should *not* be required to consider the possible embarrassment such lawsuits will entail for them or for the United States. The majority's error allows the fear of tort lawsuits to taint officials' already complicated foreign policy analysis. *Cf. Johnson v. Eisentrager*, 339 U.S. 763, 789, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation—

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[4] We should be concerned with the possibility that parties will urge juries with no foreign policy expertise to "send a message" to the United States government that particular foreign policy actions violate international norms of civilized conduct, as advanced by self-interested advocates. This is no way to conduct a foreign policy.

even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.").

The majority's second-guessing of the executive branch's decision to capture Alvarez is also unseemly in that it prevents our government from speaking with a single voice on an important foreign policy decision. This feature of the majority decision is inconsistent with the Supreme Court's *Baker v. Carr* decision, which identified "multifarious pronouncements by various departments on one question" as an evil against which the political question doctrine guards. *See Baker*, 369 U.S. at 217, 82 S.Ct. *691*. *See also id.* at 211, 82 S.Ct. 691 (noting that foreign policy questions "uniquely demand single-voiced statement of the Government's views"). By effectively taking the side of Mexico in this international dispute, the majority invades the province of the executive branch and embarrasses the United States on the international stage. The majority decision undermines not only the United States's foreign policy objectives, but also the unelected judiciary's fragile legitimacy with the American public.

The majority makes an unconvincing effort to limit its decision's scope.[5] Despite that effort, the grave implications of the majority decision are plain. By holding that federal courts can review for compliance with international law executive branch decisions to act against foreign nationals on foreign soil, the majority transforms the executive branch's foreign policy decisions into occasions for judicial review. The detention and interrogation of suspected terrorists in

[5] Perhaps recognizing the manifold difficulties its decision creates, the majority attempts to limit its holding by reciting that it "does not speak to the authority of other enforcement agencies or the military, nor to the capacity of the Executive to detain terrorists or other fugitives under circumstances that may implicate our national security interests." I am concerned that the line the majority tries to draw in limiting its decision is more illusory than real.

Afghanistan; the bombing of Iraq; intelligence gathering around the world-under the majority's holding, these and other foreign policy actions may be the next subject of federal court litigation. The majority unintentionally licenses the United States's enemies, or those who desire to embarrass the United States, to use the federal courts for the purpose of propaganda or to accomplish more insidious ends. This use of the federal courts is altogether inappropriate, and the political question doctrine should guard against it.

The Supreme Court's past decisions in cases implicating foreign policy underscore the need to dismiss this case because it presents a nonjusticiable political question. The Supreme Court has held that it is improper for a court to review the executive's recognition of a foreign government, *Oetjen,* 246 U.S. at 302; to review the executive's determination that an individual claiming immunity possess diplomatic status, *In re Baiz*, 135 U.S. 403, 432, 10 S.Ct. 854, 34 L.Ed. 222 (1890); to review the executive's determination that a ship owned by a foreign nation is immune from in rem jurisdiction, *Ex Parte Peru*, 318 U.S. 578, 588-89, 63 S.Ct. 793, 87 L.Ed. 1014 (1943); to review the constitutionality of an undeclared war, *Atlee v. Richardson*, 411 U.S. 911, 911, 93 S.Ct. 1545, 36 L.Ed.2d 304 (1973) (affirming, without opinion, *Atlee v. Laird*, 347 F.Supp. 689, 705-07 (E.D. Penn.1972)); to review the political branches' decision to prohibit arms sales to certain countries, *Curtiss-Wright*, 299 U.S. at 315, 329, 57 S.Ct. 216; to review the executive's assignment of foreign air routes, *Waterman*, 333 U.S. at 113-14, 68 S.Ct. 431; to review the political branches' determinations of when hostilities on foreign soil began or ended, *Ludecke v. Watkins*, 335 U.S. 160, 167-69, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948); and, most relevant to this case, to judge whether the executive acted unlawfully in sending American troops to foreign soil. *Eisentrager*, 339 U.S. at 788-89, 70 S.Ct. 936.

An exercise of jurisdiction by federal courts in these cases deemed nonjusticiable by the Supreme Court-like the majority's exercise of jurisdiction in this case-would have divided our nation's government, pitting the judiciary against the political departments in matters involving our nation's conduct of foreign affairs. The majority's holding today that courts may review executive branch decisions to act against foreign nationals on foreign soil for compliance with international law poses at least as great a threat to our nation's foreign policy as did judicial review in the cases described above.[6] The Supreme Court, for more than a century, has consistently rejected the attempts of interested litigants to use the federal courts as a weapon against the political branches' conduct of foreign affairs. It is unfortunate that the majority does not likewise recognize this restraint on our judicial power.

The Supreme Court's cases on the nonjusticiability of foreign policy decisions are not the only Supreme Court pronouncements that require us to reject Alvarez's lawsuit. The Supreme Court's enumeration in *Baker v. Carr* of the considerations relevant to determining whether a case presents a political question also requires dismissal. First, the majority's review of the executive branch decision to capture Alvarez ignores our Constitution's commitment of foreign policy decisions to Congress and the executive. *See Baker*, 369 U.S. at 217, 82 S.Ct. 691 (referring to "commitment of the issue to a coordinate political department" and a "policy determination of a kind clearly for nonjudicial discretion"). Second, it ignores the fact that federal judges lack the knowledge or training or tools to decide when such action is

[6] This case should have been dismissed not only as to the United States and the DEA agent defendant, but also as to Francisco Sosa, for he was acting under the direction of the United States, and it would be difficult to decide the propriety of his actions without commenting on the propriety of the executive's actions.

appropriate for the United States's foreign policy. *See id.* (referring to "a lack of judicially discoverable and manageable standards"). Third, it shows disrespect for the executive branch's management of foreign policy. *See id.* (referring to "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"). Fourth, it causes our government to speak with inconsistent voices about an issue on which our government should speak with one voice. *See id.* (referring to "the potentiality of embarrassment from multifarious pronouncements by various departments on one question" and "an unusual need for unquestioning adherence to a political decision already made").

Any *one* of the *Baker v. Carr* considerations is sufficient to render a case nonjusticiable. *Id.; Made in the USA Found. v. United States*, 242 F.3d 1300, 1312 (11th Cir.2001). In this case, *all* of the *Baker v. Carr* considerations weigh sharply in favor of nonjusticiability. The majority errs by deciding the merits of this case.[7]

Human nature being what it is, and judicial nature following human nature, it is only natural that well-meaning judges will desire to comment on important affairs of the day involving political relations with other nations.[8] But if the

[7] If I am mistaken that this case must be dismissed as presenting a nonjusticiable political question, then I agree with Judge O'Scannlain's dissenting opinion that federal law authorized the DEA agents' conduct. *See supra* at 645 (en banc) (O'Scannlain, J., dissenting).

[8] It is not surprising that judges would want to promote the rule of law, including international law, particularly if they can have the last word on what that law requires. But that is no justification for an improvident exercise of an essentially political power concerning foreign affairs. The failure of my colleagues in the majority to address the political question doctrine, and the modest attention given it by my colleagues in dissent, *see supra* at 646-647 n. 2 (O'Scannlain, J., dissenting), might be explained by the government's failure to raise this issue. However, because the political question doctrine affects our jurisdiction, and because the

judiciary is to preserve its legitimacy, to show the respect due coordinate branches of government, and to avoid interfering in our nation's foreign relations, judges must show more restraint than the majority shows today. If ever there was a case in which the Supreme Court should revisit the political question doctrine and limit judicial interference in questions "in their nature political," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), this is that case.[9]

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political implications of this case for executive branch actions on foreign soil affecting relations with foreign nations are grave and apparent, I believe the issue must be considered sua sponte and fronted. Of course, it is not too late for the government, in seeking corrective review by petition for writ of certiorari, to advance the position that the political question doctrine precludes jurisdiction.

[9] Even if this case did not present a nonjusticiable political question, it still should have been dismissed in part for lack of jurisdiction because the United States has not waived its sovereign immunity from lawsuits based upon the "discretionary functions" of government employees. *See* 28 U.S.C. § 2680(a). Because DEA officials' decision to order Alvarez's capture involved an element of judgment or choice based on considerations of public policy, *United States v. Gaubert*, 499 U.S. 315, 322-23, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991), it was a discretionary function that cannot be the subject of litigation against the United States. This jurisdictional flaw is not waivable, so the parties' failure to argue it does not justify our not considering it. *See, e.g., In re Di Giorgio*, 134 F.3d 971, 974 (9th Cir.1998). The claims against the United States and its employees could not proceed. The United States's sovereign immunity would not, however, prevent our exercising jurisdiction over Alvarez's claims against Sosa.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 99-56762, 99-56880

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; HECTOR BERELLEZ; BILL WATERS; PETE GRUDEN; JACK LAWN; ANTONIO GARATE-BUSTAMANTE; FRANCISCO SOSA, and five unnamed Mexican nationals currently in the federal witness protection program,
Defendants-Appellees,

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee,

v.

FRANCISCO SOSA, and five unnamed Mexican nationals currently in the federal witness protection program,
Defendants-Appellants.

Argued and Submitted June 11, 2001.
Filed Sept. 11, 2001.

Appeal from the United States District Court for the Central District of California; Stephen V. Wilson, District Judge, Presiding. D.C. No. CV 93-04072- SVW-06, D.C. No. CV 93-04072-SVW.

Before: SCHROEDER, Chief Judge, GOODWIN, Circuit Judge, and KING,[1] District Judge.

GOODWIN, Circuit Judge:

The appeal and cross-appeals in this case challenge a number of rulings in the litigation which followed the arrest of Humberto Alvarez-Machain ("Alvarez") at his office in Guadalajara by Mexican civilians, including Jose Francisco Sosa ("Sosa"), at the behest of United States Drug Enforcement Agency ("DEA") agents.

FACTUAL & PROCEDURAL BACKGROUND

Alvarez is a medical doctor. He practices in Guadalajara, Jalisco, Mexico. In February, 1985, DEA Special Agent Enrique Camarena-Salazar ("Camarena") was abducted and brought to Guadalajara, tortured, and murdered. Alvarez was present at the house where Camarena was held. In 1990 a federal grand jury in Los Angeles indicted Alvarez for his involvement in the incident, and a warrant was issued for his arrest. DEA Headquarters approved the employment of Mexican nationals to apprehend Alvarez in Mexico and to bring him to the United States. The DEA hired Garate-Bustamente ("Garate"), a Mexican informant, to contact Mexican nationals whom he believed could help in apprehending Alvarez in Mexico. Garate contacted a Mexican businessman, Ignacio Barragan ("Barragan") to assist in the operation. In March, 1990, Barragan asked a former Mexican policeman, Sosa, to participate in Alvarez's apprehension. Barragan told Sosa that the DEA had a warrant for Alvarez's arrest, would pay the operation's expenses, and, if he succeeded in bringing Alvarez to the United States, would recommend Sosa for a Mexican government position.

[1] Honorable Samuel P. King, Senior United States District Judge, for the District of Hawaii, sitting by designation.

On April 2, 1990, Sosa and others apprehended Alvarez at his office and held him overnight at a motel. The next day, they flew Alvarez to El Paso, Texas, where federal agents arrested him. Less than twenty-four hours passed between Alvarez's apprehension in Mexico and his transfer to federal custody in El Paso.

Alvarez was brought to Los Angeles for trial and remained in detention from April 1990 until December 1992. Alvarez argued that the federal courts lacked jurisdiction to try him because his arrest violated the United States-Mexico Extradition Treaty. *See United States v. Caro-Quintero*, 745 F.Supp. 599, 601 (C.D.Cal.1990). The district court and the Ninth Circuit agreed with him, *see id.* at 614 and *United States v. Alvarez-Machain*, 946 F.2d 1466, 1466-67 (9th Cir.1991), but the Supreme Court disagreed and remanded the case for trial. *See United States v. Alvarez-Machain*, 504 U.S. 655, 669-70, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992). Alvarez was acquitted, *see Alvarez-Machain v. United States*, 107 F.3d 696, 699 (9th Cir. 1996), and he returned to Mexico.

On July 9, 1993, Alvarez filed this action in which he asserted against the United States, Sosa, Garate, five unnamed Mexican civilians, and DEA agents Jack Lawn, Peter Gruden, William Waters, and Hector Berrellez the following claims: (1) kidnaping, (2) torture, (3) cruel and inhuman and degrading treatment or punishment, (4) arbitrary detention, (5) assault and battery, (6) false imprisonment, (7) intentional infliction of emotional distress, (8) false arrest, (9) negligent employment, (10) negligent infliction of emotional distress, and (11) various constitutional torts. The defendants moved to dismiss the complaint. The district court in 1995 granted the motion in part and denied the motion in part. We affirmed in part, reversed in part, and remanded the matter to the district court. *See Alvarez-Machain*, 107 F.3d at 701.

On summary judgment, the district court entered a judgment against Sosa for kidnaping and arbitrary detention

under the Alien Tort Claims Act ("ATCA"). The district court held that Alvarez could recover damages only for his detention prior to his arrival in the United States, applied United States rather than Mexican damage laws, and awarded Alvarez $25,000. The district court substituted the United States for the DEA agents and dismissed Alvarez's Federal Tort Claims Act ("FTCA") claims. Alvarez has appealed the district court's decision to substitute the United States for the DEA agents and its dismissal of his FTCA claims of false arrest, false imprisonment, kidnaping, and intentional and negligent infliction of emotional distress. He also appeals the district court's decision to limit damages to those imposed for his imprisonment in Mexico. He has dropped his allegations of mistreatment in Mexico and in the United States and the related causes of actions. Sosa appeals the judgment against him and assigns error to the district court's choice of federal common law of damages on the ATCA claim. The parties have stipulated to the dismissal of Alvarez's case against Garate.

Alvarez's ATCA claim

The district court found two independent grounds for sustaining jurisdiction and a claim for relief against Sosa for kidnaping under the ATCA. First, it held that state-sponsored abduction within the territory of another state without its consent is a violation of international law of sovereignty. Second, it held that state-sponsored abduction violates customary norms of international human rights law. We hold that Alvarez has standing to recover under the ATCA based only on the second ground.

A. Meaning of "Law of Nations"

The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1993). Sosa argues

on appeal that only violations of *jus cogens* norms are actionable under the ATCA. *Jus cogens* norms are "rules of international law [that] are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them." Restatement (Third) of Foreign Relations Law § 102, cmt. k. However, Sosa's contention that there must be *a jus cogens* violation for the ATCA to apply finds no support in cited cases. ATCA cases have held that the norm must be "specific, universal, and obligatory." *In re Estate of Ferdinand E. Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir.1994); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir.1998). This Court has held that a *jus cogens* violation satisfies the "specific, universal, and obligatory" standard, *Hilao v. Estate of Marcos*, 103 F.3d 789, 795 (9th Cir.1996), but it has never held that *a jus cogens* violation is required to meet the standard. In *Martinez*, 141 F.3d at 1383, we stated that arbitrary arrest and detention were actionable under the ATCA, but did not consider whether they constituted *jus cogens*. We have recognized that the "law of nations," the antecedent to customary international law, and *jus cogens* are related but distinct concepts. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-16 (9th Cir.199!). Therefore, we reject Sosa's argument that the ATCA requires a violation of *a jus cogens* norm and decline to decide whether arbitrary detention and kidnaping reach this heightened standard.

B. Mexican Sovereignty

Alvarez's claim that Sosa should be liable under the ATCA because his kidnaping violated Mexican territorial sovereignty fails. Alvarez lacks standing to sue for the violation. The Supreme Court has held that "the irreducible constitutional minimum of standing contains three elements:" (1) an "'injury in fact'—an invasion of a legally protected interest

which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical,'" (2) a "causal connection between the injury and the conduct complained ofthe injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court,'" and (3) the likeliness that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations omitted). Alvarez's abduction does not satisfy the *Lujan* test, because Alvarez does not have a legally protected interest in Mexican sovereignty. As the Fifth Circuit has explained, "it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress." *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir.1988) (discussing an individual's lack of standing to sue for a violation of an international treaty). Only Mexico has standing to object to encroachments on its territorial sovereignty.

C. Rights to Freedom of Movement, to Remain in One's Country, and Security in One's Person

Alvarez's kidnaping was nonetheless a violation of the "law of nations" because it violated customary international human rights law. The Supreme Court has stated that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 5 Wheat. 153, 18 U.S. 153, 160-61, 5 L.Ed. 57 (1820); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2nd Cir.1980). *See also The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900) (stating "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of

jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."). The Second Circuit also has used United Nations ("U.N.") declarations as evidence of the law of nations:

> These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter . . . Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty'" against "non-binding pronouncement," but is rather an authoritative statement of the international community.

Filartiga, 630 F.2d at 883. Sosa cites the Restatement of Foreign Relations law for the proposition that no human rights instrument states explicitly that forcible abduction violates international human rights law. *See* Restatement (Third) of Foreign Relations Law of the United States § 432 n. 1 (1987) ("none of the individual human rights conventions to date . . . provides that forcible abduction or irregular extradition is a violation of international human rights law"). Sosa fails to mention that the Restatement continues:

> However, Articles 3, 5, and 9 of the Universal Declaration of Human Rights, as well as Articles 7, 9 and 10 of the International Covenant on Civil and Political Rights might be invoked in support of such a view. In 1981 the Human Rights Committee established pursuant to Article 28 of the Covenant decided that the abduction of a Uruguayan refugee from Argentina by Uruguayan security officers constituted arbitrary arrest and detention in violation of Article 9(1). 36 U.N. GAOR, Supp. No. 40, at 176-84 (1981), see also id. at 185-89.

Id.

Although no international human rights instruments refers to transborder abduction specifically, various established international human rights norms, like the rights to freedom of movement, to remain in one's country, and to security in one's person, encompass it. Neither Sosa nor the Government challenges Alvarez's standing to claim a violation of his individual human and civil rights.

A number of international human rights instruments, which are evidence of customary international law, see *Siderman*, 965 F.2d at 716, assert the right of an individual to liberty and security. The American Convention on Human Rights (hereinafter "American Convention") provides that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto" and that "[n]o one shall be subject to arbitrary arrest or imprisonment." O.A.S. Official Records, arts. 7(2)7(3), OEA/Ser.K/XVU1.1, Doc. 65, Rev. 1, Corr. 2 (1970) (signed but not ratified by the United States), reprinted in 9 I.L.M. 673, 676 (1970).

Alvarez's abduction occurred pursuant neither to the laws of Mexico nor to the laws of the United States. The Universal Declaration of Human Rights (hereinafter "Universal Declaration") provides that "[e]veryone has the right to freedom of movement and residence within the borders of each State." G.A. Res. 217A(III), 3 U.N. GAOR Supp. No. 16, U.N. Doc. A/810 (1948), art. 13(1). The International Covenant on Civil and Political Rights ("ICCPR") reiterates this guarantee. *See* ICCPR, art. 12, adopted Dec. 16, 1966, S. Treaty Doc. 95-2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, entered into force for the United States Sept. 8, 1992). By kidnaping Alvarez and taking him to the United States, Sosa encroached on his rights to freedom of movement and residence.

Regional agreements also affirm the rights of freedom of movement and residence. The American Declaration of the Rights and Duties of Man, (hereinafter "American Declaration"), arts. 1, 8, OAS Doc. OEA/Ser. L/V/II.65, Doc. 6, pp. 19-25, May 2, 1948, asserts every person's right to "liberty and security of his person, to 'fix his residence within the territory of the state of which he is a national, . . . and not to leave it except by his own will.'" The American Convention echoes the American Declaration's guarantees of the right to personal liberty and security, and the right not to be expelled from the territory of the state of one's nationality. American Convention, arts. 7, 22. *See also* Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 22, 1984, Europ. No. 117, 24 I.L.M. 435 (1985); African Charter on Human and Peoples' Rights, art. 12, June 27, 1981, 21 I.L.M. 58, 60. Here, Sosa and his fellow kidnapers forced Alvarez to leave Mexico against his will.

Thus, we agree with the district court that Alvarez's kidnaping violated his rights to freedom of movement, to remain in his country, and to security in his person, which are part of the "law of nations."

D. Arbitrary detention

Alvarez's seizure also violated the international customary legal norm against arbitrary detention. This Circuit has found a "clear international prohibition against arbitrary arrest and detention" and has held that the ATCA reaches this conduct. *Martinez*, 141 F.3d at 1384. In *Martinez*, we held that the detention was not arbitrary because it was pursuant to a valid Mexican warrant. *See id.* Alvarez argues that, under *Martinez*, his arrest and detention were arbitrary because there was no Mexican warrant or any lawful authority for his arrest. We agree.

According to *Martinez*, "detention is arbitrary if 'it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Id.* (quoting Restatement of Foreign Relations law § 702 cmt. h). The district court held that the detention was arbitrary, because the United States warrant for Alvarez's arrest had no legal effect in Mexico, and the DEA had no legal authority for kidnaping him. A warrant issued by a United States court is valid only "within the jurisdiction of the United States." *See* Fed.R.Crim.P. 4(d)(2).

The *Martinez* court also noted: "[d]etention is arbitrary if 'it is not accompanied by notice of charges; if the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time.'" *Id.* Sosa argues that this statement encompasses the *Martinez* "test" for arbitrariness under international law. He does not explain how the "not pursuant to law" or "incompatible with the principles of justice or with the dignity of the human person" statements fit into the test. It would be more accurate to treat this second statement as an illustrative, not exhaustive, list of circumstances that make a detention arbitrary.

Sosa also maintains that Alvarez's detention was not prohibited by international law because it was not "prolonged." He argues that because the plaintiff in *Martinez* was detained illegally for 59 days, *see Martinez*, 141 F.3d at 1377, and Alvarez was held for less than twenty-four hours in Mexico, his detention was not actionable. However, the *Martinez* court set no time component in its arbitrary detention rule. The Court said simply: "there is a clear international prohibition against arbitrary arrest and detention," and cited Article 9 of the Universal Declaration and Article 9 of the ICCPR, neither of which include a temporal component. *Martinez*, 141 F.3d at 1384.

A kidnaping that ends in the death of a victim may have a duration of less than an hour. The effect on the victim has nothing to do with duration of the wrongful act. Accordingly, we hold that Alvarez's detention was arbitrary and, therefore, violated the "law of nations."

Substitution of the United States under 28 U.S.C. § 2679

The district court did not err in substituting the United States for the individual DEA defendants. Whether the district court erred in substituting the United States under 28 U.S.C. § 2679 is a matter of statutory interpretation and is therefore reviewed de novo. *See United States v. Juvenile Male (Kenneth C.)*, 241 F.3d 684, 686 (9th Cir.2001).

Alvarez argues that the district court erred in its January 1995 order determining that Alvarez's claims under the ATCA were subject to substitution under the Federal Employees Liability Reform and Tort Compensation Act ("Liability Reform Act"), 28 U.S.C. § 2679 (1994). The Liability Reform Act provides that for most civil actions based on the wrongful conduct of federal employees acting within the scope of their employment, the only remedy is a FTCA lawsuit against the government itself. *See* 28 U.S.C. § 2679(b)(1) (1994). However, the exclusive remedy provision "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B).

The district court held that an action under the ATCA was not exempt from the exclusive remedy provision of the Liability Reform Act. It reasoned that "it is international law, not the ATCA," that gives individuals fundamental rights. Therefore, a claim under the ATCA is based on a violation of international law, not of the ATCA itself.

This reading is consistent with the Supreme Court's reasoning in *United States v. Smith*, 499 U.S. 160, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991). In *Smith*, the Court rejected the argument that a claim for medical malpractice was "authorized" by the Gonzalez Act and therefore fit the 28 U.S.C. § 2679(b)(2)(B) exception for violations of a statute. The court explained: "[n]othing in the Gonzalez Act imposes any obligations or duties of care upon military physicians. Consequently, a physician allegedly committing malpractice under state or foreign law does not 'violate' the Gonzalez Act." *Smith*, 499 U.S. at 174, 111 S.Ct. 1180.[2] The same can be said of the ATCA. The language of § 1350 creates no obligations or duties. Admittedly, the ATCA differs from the Gonzalez Act in that it creates a cause of action for violations of international law, whereas the Gonzalez Act limited the common law liability of doctors. *See In re Estate of Marcos*, 25 F.3d at 1475 (rejecting the argument that the ATCA is merely jurisdictional); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir.1996); *Filartiga*, 630 F.2d at 885-86. Nonetheless, we find nothing in this distinction to cause us to deviate from the plain language of the statute. We therefore agree with the district court that Alvarez's claims under the ATCA were subject to substitution under the Liability Reform Act. Accordingly, Alvarez's exclusive remedy against the United States, in lieu of the DEA agents, is through the FTCA.

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[2] The relevant provision of the Gonzalez Act provides:

> "The remedy against the United States provided by [the FTCA] for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician . . . of the armed forces . . . while acting within the scope of his duties or employment . . . shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician . . . whose act or omission gave rise to such action or proceeding."

10 U.S.C. § 1089(a) (1998).

FTCA claims against the United States

The FTCA acts as a waiver of the United States' sovereign immunity for certain torts committed by its employees. 28 U.S.C. §§ 1346(b), 2674. The statute provides that "[t]he United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 2674 (1994). We review *de novo* the district court's determination of subject matter jurisdiction under the FTCA. *See Brady v. United States*, 211 F.3d 499, 502 (9th Cir.) cert. denied, 531 U.S. 1037, 121 S.Ct. 627, 148 L.Ed.2d 536 (2000).

A. The "Foreign Activities" Exception

We agree with the district court that the "foreign activities" exception to the FTCA does not apply to this case, because Alvarez asserted a valid "headquarters claim." The FTCA exempts from its coverage "any claim arising in a foreign country." 28 U.S.C. § 2680(k) (1994). This exemption "is more than a choice of law provision: it delineates the scope of the United States' waiver of sovereign immunity." *Smith v. United States*, 507 U.S. 197, 200, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993). However, creating the so-called "headquarters doctrine," the Supreme Court has held that the FTCA requires federal courts to look to the law of the place where the act took place, rather than the place where the act had its operative effect. *See Richards v. United States*, 369 U.S. 1, 10, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962).

The district court did not err in holding that Alvarez had stated a valid headquarters claim "with respect to his claim for false arrest/false imprisonment and intentional infliction of emotional distress from his seizure." Although the "operative effect" of Alvarez's kidnaping occurred in Mexico, all of the command decisions about his seizure and removal to the United States occurred in California. In *Leaf v. United States*, 588 F.2d 733, 735 (9th Cir.1978), this Court held that

a claim "arises, as that term is used in Sections 1346(b) and 2680(k), where the acts or omissions that proximately cause the loss take place."

Under California law, a person proximately causes a loss if his actions were a substantial factor in increasing the likelihood of the loss. *See Vickers v. United States*, 228 F.3d 944, 956 (9th Cir.2000). The DEA defendants' conduct not only created the risk that Alvarez would be abducted, it was the cause in fact. According to the district court, the DEA officers:

> sought individuals who could work in Mexico to bring Plaintiff to the United States. Government employees gave explicit instructions on the person it [sic] wanted seized, the background of those who would seize him, and how those individuals should treat him during his trip to the United States. At a later stage, government employees instructed the arrest team where to fly the plane and obtained clearance for the plane to land.

Moreover, as this Court explained in *Vickers:*

> It is well established under California law that the criminal or negligent acts of a third party do not break the causal link between the defendant's conduct and the alleged injuries, if the defendant's conduct created or increased the risk of such acts.

Vickers, 228 F.3d at 956. The involvement of Mexicans in physically seizing Alvarez did not break the chain of causation; they merely completed the chain. The DEA's planning assured that they would kidnap Alvarez.

As the district court noted, Alvarez's claims resemble those asserted in other cases in which courts have found valid headquarters claims and refused to apply the foreign claim exclusion. For example, in a case where the failure of the DEA and Customs to coordinate an operation led to the

incarceration of a number of individuals in Honduras, the Eleventh Circuit held that, although the actual arrest and injury occurred in Honduras, the negligent act or omission occurred in the United States. *See Couzado v. United States*, 105 F.3d 1389, 1394-96 (11th Cir.1997). *See also Sami v. United States*, 617 F.2d 755, 761-63 (D.C.Cir.1979) (applying headquarters doctrine to claim of false arrest where the arrest took place in Germany because the instructions to make the arrest occurred in the United States); *Donahue v. United States Dep't of Justice*, 751 F.Supp. 45, 48-49 (S.D.N.Y. 1990) (allowing a headquarters claim "insofar as the act of negligence is alleged to have occurred in the United States"); *Glickman v. United States*, 626 F.Supp. 171, 174 (S.D.N.Y. 1985) (holding that the "foreign country" exception did not bar an action filed by an American citizen who alleged that, while he was in Paris in 1952, a Central Intelligence Agency agent surreptitiously drugged him with LSD where the complaint alleged that the program to administer drugs to unwitting persons originated in the United States).

Cominotto v. United States, 802 F.2d 1127 (9th Cir.1986), a Ninth Circuit case in which the court refused to apply the headquarters doctrine, is distinguishable. In *Cominotto*, we held that the Federal Government's alleged negligence in failing to provide adequate guidance in connection with an undercover operation was not the proximate cause of the plaintiff's injuries and therefore did not fall under the headquarters doctrine. Cominotto, a DEA informant, violated Secret Service instructions by meeting suspects at night, entering their automobile, leaving Bangkok, and heading for a private meeting place. He was shot in the leg while "fleeing from a dangerous situation in which he had placed himself," and "was the sole and proximate cause of his injuries." *Id.* at 1130. As discussed above, nothing in Alvarez's case breaks the chain of causation. Sosa and his fellow abductors brought Alvarez to the United States pursuant to the plan of the United States government officials. The injury, Alvarez's

false arrest, occurred as a direct and intended result of the DEA's plans. Thus, the headquarters doctrine applies.

The United States argues that the headquarters doctrine does not apply to intentional torts, but cites little support for this contention. The Government argues that "there can be no question that a court, when choosing between two states for the purposes of the FTCA, would always find that the intentional tort 'occurred' where the alleged tortious act was committed." The only case it cites is a Fifth Circuit case, *Landry v. A-Able Bonding, Inc.*, 75 F.3d 200, 205 n. 7 (5th Cir.1996), which applied Texas law to a claim of false imprisonment that took place in Texas pursuant to an arrest warrant issued in Louisiana. The *Landry* court's deciding a Texas state law claim of false imprisonment gives us little guidance in deciding a claim under the FTCA based on California law. We hold that the headquarters doctrine applies to intentional torts as well as cases of negligence and, therefore, applies to Alvarez's case.

B. False Arrest under the FTCA

1. Intentional Torts Exception

We agree with the district court that the intentional tort exception to the FTCA does not apply to Alvarez's case. The FTCA's waiver of sovereign immunity contains an exception for intentional torts, including false arrest, unless the intentional tort be committed by an "investigative or law enforcement officer." 28 U.S.C. § 2680(h) (1994). The statute defines an "investigative or law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* The district court held that the intentional tort exception should not apply here because Alvarez's "claim contemplates liability for the actions of the

law enforcement officers in the United States and those individuals should face liability for instructing others to do what the law enforcement individuals could not."

Although Sosa is not an officer of the United States and is not "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law," he served as an agent or instrument for DEA agents who have these powers. *See 21* U.S.C. § 878(a)(2), (3), and (4) (1999). *See also Van Schaick v. United States*, 586 F.Supp. 1023, 1032-33 (D.S.C.1983) (holding that a county sheriff and a city police officer were investigative or law enforcement officers within the meaning of § 2680(h), because they were agents of the Assistant United States Attorney and the DEA agent, who directed them to make the arrest and secure the aircraft for the DEA). Indeed, as the district court explained, the policy reason for the "law enforcement officer" exception to the "intentional torts" exception to the FTCA-to "provid(e) a remedy against the Federal Government for innocent victims of Federal law enforcement abuses" applies here. Law enforcement officers cannot escape liability by recruiting civilians to do their dirty work.

As the district court noted, there appears to be no circuit law on point. The Eleventh circuit has dealt with the opposite situation where non-enforcement individuals tricked members of law enforcement into an arrest. *See Metz v. United States*, 788 F.2d 1528, 1531-32 (11th Cir.1986) (holding "that the provision permitting governmental liability on the basis of actions of law enforcement officers cannot be expanded to include governmental actors who procure law enforcement actions, but who are themselves not law enforcement officers").

Although there is no FTCA law on point, principles of Fourth Amendment law bolster our interpretation of the statute. The Fourth Amendment covers only government, not private, conduct, yet the Supreme Court has held that it

prohibits unreasonable intrusions by private individuals who are acting as government instruments or agents. *See Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The Ninth Circuit has adopted a test for determining whether "a private individual is acting as a governmental instrument or agent for Fourth Amendment purposes." *United States v. Reed*, 15 F.3d 928, 931 (9th Cir.1994). A court must ask: "(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends." *Id.* These factors, although intended for Fourth Amendment analysis, are useful in determining whether Sosa acted as an agent or instrumentality of the DEA law enforcement agents when he arrested and kidnaped Alvarez. The government admits that it knew of and acquiesced in the plan to kidnap Alvarez and bring him to the United States. Sosa performed the search to assist the DEA agents. Sosa had no individual interest in kidnaping Alvarez other than to curry favor with the DEA agents in the hopes that they would reward him. Therefore, because Sosa acted merely as an agent or instrument for "law enforcement officers," the United States has waived sovereign immunity.

2. Merits of False Arrest Claim

The FTCA states that the liability of the United States should be determined "in accordance with the law of the place where the [allegedly tortious] act or omission occurred." 28 U.S.C. § 1346(b) (1993). The parties agree that, assuming the foreign claims exclusion act does not apply, California law should apply here. "Under California law, the torts of false arrest and false imprisonment are not separate torts, as false arrest is 'but one way of committing a false imprisonment.'" *Watts v. County of Sacramento*, 256 F.3d 886 (9th Cir.2001) (quoting *Asgari v. City of Los Angeles*, 15 Cal.4th 744, 63 Cal.Rptr.2d 842, 937 P.2d 273,

278 n. 3 (1997)). "A cause of action for false imprisonment based on unlawful arrest will lie where there was an arrest without process followed by imprisonment." *Watts*, 256 F.3d 886 (citing *City of Newport Beach v. Sasse*, 9 Cal.App.3d 803, 88 Cal.Rptr. 476, 480 (1970); *Dragna v. White*, 45 Cal.2d 469, 289 P.2d 428 (Cal.1955)). False imprisonment "consists of the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short." *Scofield v. Critical Air Medicine, Inc.*, 45 Cal.App.4th 990, 1000, 52 Cal.Rptr.2d 915 (1996).

a. Authorization for arrest under federal law

Federal law did not give the DEA agents or Sosa "lawful privilege" to arrest Alvarez in Mexico. To determine whether a federal officer had lawful authority to carry out an arrest, a California court would first ask whether the arrest was authorized under federal law. *See Rhoden v. United States*, 55 F.3d 428, 431 (9th Cir.1995). Because Sosa acted as an agent or instrumentality for federal officers and had no independent authority for arresting Alvarez, we must ask whether the federal officers would have been authorized to arrest Alvarez.

The statute authorizing DEA enforcement neither expressly confers extraterritorial authority to the DEA nor expressly restricts its authority to the United States. We have held that agents of the Immigration and Naturalization Service ("INS") have the authority to conduct law enforcement activity outside the United States, even when Congress has not explicitly and directly conferred it on them, because Congress "has delegated broad enforcement powers to the Attorney General, who in turn has delegated those powers to the Commissioner of the INS, who in turn is authorized to delegate those powers to INS agents." *See United States v. Chen*, 2 F.3d 330, 333 (9th Cir.1993).

The Government argues that the DEA, like the INS, has extraterritorial authority. Indeed, Congress also drew the DEA's powers broadly. *See, e.g.*, 21 U.S.C. § 878(a)(3) (1999) (authorizing a DEA agent to "make arrests without warrant . . . for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony"); 21 U.S.C. § 878(a)(5) (authorizing the DEA to "perform such other law enforcement duties as the Attorney General may designate").

In other statutes where extraterritorial application was not explicit, courts have found it to be implied. *See, e.g., United States v. Cotten*, 471 F.2d 744, 751 (9th Cir.1973) (holding that "when a citizen of this country, while without the territorial jurisdiction of the United States, violates [a federal statute prohibiting the theft of government property], he is amenable to resulting criminal prosecution in United States District Courts"). The Government contends that substantive criminal statutes also indicate that Congress intended the DEA's authority not to be limited to the United States. *See, eg.*, 18 U.S.C. § 1201(e)(1) (2000) (giving the United States jurisdiction over kidnaper of internationally protected federal representatives, officers, or employees outside the United States).

As the Government also notes, other statutes appear to envision foreign law enforcement activity. Congress has authorized the military to supply equipment and assistance to federal law enforcement officers in a variety of extraterritorial operations, for example "the rendition of a suspected terrorist from a foreign country to the United States to stand trial." 10 U.S.C. § 374(b)(1)(D) (2001 Supp.). *See also* 18 U.S.C. §§ 351(g) (2000) (authorizing the military to assist in investigating kidnapings or assassinations of Congressional, Cabinet, and Supreme Court members) and 351(i) (2000) (providing for extraterritorial jurisdiction over the kidnaping and assassinations).

The Government contends that "in order for the DEA and other federal law enforcement agencies to fully execute [criminal] statutes, its arrest authority must have an equivalent extraterritorial scope." The Office of Legal Counsel used the same reasoning in an unpublished opinion, which discussed the authority of the Federal Bureau of Investigation to override international law to conduct extraterritorial law enforcement activities. *See* 13 Op. Off. Legal Counsel 163 (1989).

If this assertion is an accurate statement of United States law, then it reinforces the critics of American imperialism in the international community. An alternative interpretation would suppose that Congress intended for federal law enforcement officers to obtain lawful authority, which, for example, here might be a Mexican warrant, from the state in which they sought to arrest someone. *See* 10 U.S.C. § 374(b)(1)(D) (2001 Supp.) (providing that United States military assistance in rendering suspected terrorists to stand trial be "in accordance with other applicable law").

This reading of the DEA's authority complies with the United States' obligations under the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which provides that:

> 2. Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
>
> 3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are Exclusively reserved for the authorities of that other Party by its domestic law.

Art. 2(2)-(3), S. Treaty Doe. No. 4, 101st Cong., 1st Sess. 7, entered into force for the United States Nov. 11, 1990,

reprinted in 28 I.L.M. 497 (1989). Therefore, we hold that there was no lawful federal authority for Alvarez's kidnaping.

b. Authorization for arrest under California law

Nor did the officers or Sosa have lawful authority under California law to arrest Alvarez in Mexico. The district court held that even if the DEA did not have statutory authority to make an arrest on foreign soil, Alvarez's apprehension in Mexico was still not a "false arrest" under California law because it was something akin to a citizen's arrest. *See Padilla v. Meese*, 184 Cal.App.3d 1022, 229 Cal.Rptr. 310, 316 (1986) (holding that "[w]here an officer acts outside the scope of his statutory authority an arrest is not necessarily rendered unlawful" because it may be a lawful citizen's arrest).

However, the district court erred in turning to the law of citizen's arrests. We have held that "the proper source for determining the government's liability [for false imprisonment by IRS officers under the FTCA] is not the law of citizen's arrests, but rather the law governing arrests pursuant to warrants." *Arnsberg v. United States*, 757 F.2d 971, 979 (9th Cir.1985). In *Arnsberg*, the court reasoned that IRS agents had "law enforcement obligations, such as the duty to execute warrants, which private citizens lack," which made "the law of citizen arrests an inappropriate instrument for determining FTCA liability." *Id.* at 979. DEA agents Gruden, Lawn, Waters, and Berrellez, also had law enforcement obligations, including the duty to execute warrants, which private citizens lack. *See 21* U.S.C. § 878(2) (1999).

Ultimately, the *Arnsberg* court rejected the plaintiffs claim of false imprisonment under the FTCA because the agents, having attempted but failed to effect personal service and having followed the advice of a United States Attorney, "acted nearly perfectly," made only a "relatively minor and a relatively technical" error, and acted properly under the

general common law. *Arnsberg*, 757 F.2d at 979. The officers here did not act "nearly perfectly." They arranged the kidnaping of Alvarez outside of the jurisdiction of their United States warrant. The warrant did not suffer from "relatively minor" or "relatively technical" defects. While valid on its face, it simply had no effect in Mexico. The invalidity of the warrant for the purposes of Alvarez's arrest meant that the DEA agents did not act properly under the general common law. As the *Arnsberg* court noted, according to the Restatement (Second) of Torts, §§ 122-24 (1965), "an arrest is privileged if it is made pursuant to a warrant which is regular in form and which reasonably appears to have been issued by a court with jurisdiction." *Id.* Here, the Los Angeles court was of competent jurisdiction to issue a warrant for the arrest of an individual in the United States, but had no jurisdiction to issue a warrant for an arrest in Mexico. *See* Fed.R.Crim.P. 4(d)(2).

C. California Statutory Immunities

To the extent that the district court's opinion can be read to suggest that the DEA defendants were immune from a suit under the FTCA due to California statutory immunities, it is incorrect.[3] A number of cases have rejected attempts to limit

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[3] It appears that the district court did not hold that the DEA officers were immune. It noted that the parties were confusing matters by discussing immunity, because the defendants were not arguing that they were immune under state law, but rather that the arrest was not unlawful under state law. Despite arguing that immunity was not at issue, the district court suggested that it believed the officers could be immune from FTCA liability under state law. The court described *Ting v. United States*, 927 F.2d 1504, 1514 (9th Cir.1991) and *Arnsberg v. United States*, 757 F.2d 971 (9th Cir.1985) as cases in which the Ninth Circuit had applied state immunity principles to a claim of false arrest under the FTCA. The district court also declared that *Ting* "directly govern[ed]" Alvarez's case. As Alvarez notes, the *Ting* court did not decide whether state immunities under Cal. Civ. Cod § 43.55 could bar FTCA claims. Instead, it based its holding on the absence of malice, a requirement for the claim of false

FTCA liability based on state immunities. In *United States v. Muniz*, the Supreme Court rejected the application of state immunity for jailers in an FTCA suit. *See United States v. Muniz*, 374 U.S. 150, 164-66, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963). The Court explained: "we think it improper to limit suits by federal prisoners because of restrictive state rules of immunity." *Id.* at 164-65, 83 S.Ct. 1850. *See also Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). Similarly, "[t]he Ninth Circuit has refused to grant immunity to federal officers based on state statutes that confer public entity immunity for the conduct of government employees in an action against the United States under the FTCA." *Stuart v. United States*, 23 F.3d 1483, 1488 (9th Cir. 1994). In *Stuart*, we held that a California statute that gave public entity immunity for peace officers in vehicular pursuits did not provide immunity to the United States in action under FTCA. *See id.* Because state privileges do not bar holding federal officers liable under the FTCA, the Court need not decide whether the arrest was privileged under California law.

Therefore, we hold that the arrest of Alvarez was a "false arrest," for which the United States is liable under the FTCA.

Choice of Law for ATCA Damages

The district court did not err in choosing to apply the federal common law rather than Mexican law in determining the amount of damages to award Alvarez for his ATCA claim against Sosa. This Court reviews de novo the district court's

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arrest. *See Ting* 927 F.2d at 1514. Nor does *Arnsberg* stand for the proposition that state immunities could bar an FTCA claim. In *Arnsberg*, the Court held that IRS agents who consulted with an assistant United States Attorney before they sought the warrant and could reasonably rely on the attorney's belief that the arrest was legal were insulated by qualified immunity under federal law in a Bivens action for executing invalid material witness arrest warrant, but that state citizen's arrest law did not apply. *Arnsberg*, 757 F.2d at 979, 981.

decision concerning the appropriate choice of law. *Abogados v. AT & T, Inc.*, 223 F.3d 932, 934 (9th Cir.2000). The district court applied federal common law because it concluded that applying Mexican law, which would limit the amount of damages and prevent the consideration of punitive damages, would "inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States." It explained that "the use of federal common law remedies, including the possibility of punitive damages, best serve[d] the end of the Alien Tort Claims Act."

Sosa maintains that the district court should have used Mexican law because the injury occurred in Mexico. Federal common law determines the choice of law rule, because the court heard the case under its federal question jurisdiction. *See Schoenberg v. Exportadora de Sal, S.A.*, 930 F.2d 777, 782 (9th Cir.1991). Federal common law follows the Restatement (Second) of Conflict of Laws ("Restatement of Conflicts"). *See id.* Sosa cites the Restatement provision on personal injuries for his claim that "there is a presumption that the law of the place where the injury occurs applies." *See* Restatement of Conflicts § 146. However, the Restatement does not classify this case as a personal injury case. Comment b to § 146 explains that

> A personal injury may involve either physical harm or mental disturbance, such as fright and shock, resulting from physical harm or from threatened physical harm or other injury to oneself or to another. On the other hand, injuries to a person's reputation or the violation of a person's right of privacy are not "personal injuries" in the sense here used.

Id. (citations and internal quotations omitted). Alvarez's claim is not based on the assaultive physical or mental harm suffered, but rather on the deprivation of his rights to be free from arbitrary arrest, to liberty, to remain in his country, and to freedom of movement.

Thus, the general principle on conflict of laws for tort claims is more useful here. Under the General Principle for torts announced in the Restatement of Conflicts § 145;

> The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

The Restatement of Conflicts § 6 provides a list of factors to be used to determine the appropriate rule of law, which include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement of Conflicts § 6.

Applying the § 6 factors to this case favors the choice of federal common law. The needs of the international system are too complex to dictate clearly the choice of either Mexican or federal common law. However, it is difficult to deny that encouraging states and individuals to comply with international law is beneficial and that damages for torts committed in violation of international law will encourage compliance. The United States, in enacting the ATCA, has expressed a policy to provide a cause of action and a federal

forum to fashion remedies for violations of international law. *See Abebe-Jira*, 72 F.3d at 848. The United States has an interest in other states' respecting the human rights of its citizens. Mexico has an interest in the United States doing the same. Moreover, "[s]ince it is the plaintiff[ ] and not the defendants who [is] the Mexican resident[ ] in this case, Mexico has no interest in applying its limitation of damages—Mexico has no defendant residents to protect and has no interest in denying full recovery to its residents injured by non-Mexican [sic] defendants." *Hurtado v. Superior Court of Sacramento County*, 11 Cal.3d 574, 114 Cal.Rptr. 106, 522 P.2d 666 (1974). Because this is an action in tort, not contract, the justified expectations factor does not apply. *See Lange v. Penn. Mut. Life Ins. Co.*, 843 F.2d 1175, 1180-81 (9th Cir.1988).

The remaining § 6 factors also favor the application of federal common law. The basic policies underlying international human rights law would be enhanced by selecting the stronger federal common law of damages. Potential violators of human rights norms should know that they will pay for their actions. Choosing federal common law enhances the certainty, predictability, and uniformity of damage awards under the ATCA, because the remedy will not depend on the laws of the country in which a violation occurred. Finally, because United States courts have more experience in applying federal common law than Mexican law, it will be easier for them to determine and apply the familiar law. Applying Mexican law, the court would face both language barriers and the need to become familiar with a civil code system of law.

Caveat: the Restatement § 145 also provides "contacts to be taken into account in applying the principles of § 6 . . ." It is less clear which laws these "contacts" favor. These contacts include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

Restatement of Conflicts § 145(2). The kidnaping occurred in Mexico. However, an important part of the conduct that caused the injury, the planning of the DEA, occurred in the United States. Alvarez and Sosa are both Mexican. Alvarez lives and works in Mexico. Although Sosa lived in Mexico before the kidnaping, he now lives in the United States. Nonetheless, we believe that the relationship between the parties is centered in the United States. Sosa abducted Alvarez pursuant to the agenda of United States DEA agents. The DEA agents wanted Alvarez apprehended in order to prosecute him in the United States for his alleged participation in the killing and torture of an American DEA agent in Mexico. In sum, although a case can be made for applying Mexican law, the district court did not err in choosing to apply federal common law.

Scope of damages

We agree with the district court that Alvarez cannot recover damages for his entire imprisonment in the United States. Whether Alvarez can recover damages for the duration of his imprisonment in the United States is a question of law, and, therefore, is reviewed de novo. *See United States v. Stephens*, 237 F.3d 1031, 1033 (9th Cir.2001). As noted, in determining the scope of damages for Alvarez's ATCA claim, we look to federal law. By contrast, for Alvarez's FTCA claim, "the extent of the United States' liability under the FTCA is generally determined by reference to state law." *Molzof v. United States*, 502 U.S. 301, 305, 112 S.Ct. 711, 116 L.Ed.2d 731 (1992).

Although we have found neither federal nor state law cases that have dealt with the question whether an individual who has been kidnaped and brought to the United States for a criminal prosecution can recover damages for the duration of his imprisonment in the United States, we agree with the district court that "the lawful arrest warrant and indictment broke the chain of causation from [Sosa]'s actions to [Alvarez]'s continuing injuries."

As the district court explained, the rationale of federal cases involving false arrest and imprisonment is useful here despite the uniqueness of the facts. With respect to a § 1983 action based on false arrest, this Court has stated:

> Filing of a criminal complaint immunizes investigating officers such as the appellants from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time.

Smiddy v. Varney, 665 F.2d 261, 266-67 (9th Cir.1981). In Alvarez's case, the DEA had an independent and lawful basis for Alvarez's arrest once he fell within the jurisdiction of the warrant and felony indictment.

Similarly, California courts have cut off liability for false arrest at the date of arraignment, *see County of Los Angeles v. Superior Court*, 78 Cal.App.4th 212, 92 Cal.Rptr.2d 668, 677 n. 4. (2000), but the reasoning for the cut-off differs from that of federal law, and Alvarez contends that it does not apply to this case. In *Asgari v. City of Los Angeles*, 15 Cal.4th 744, 757, 63 Cal.Rptr.2d 842, 937 P.2d 273 (1997), the California Supreme Court held that Government Code § 821.6 precluded a plaintiff in a false arrest action from recovering for injuries attributable to the period of incarceration after his or her arraignment on criminal charges.

According to Alvarez, *Asgari* merely holds that Cal. Gov.Code § 821.6, which provides public employees with immunity from malicious prosecution actions, immunizes public employees from damages for false imprisonment from the time of lawful arraignment on.[4] As Alvarez notes, Sosa is not a public employee under § 821.6, because he is not an employee of a California state entity. *See Randle v. City and County of San Francisco*, 186 Cal.App.3d 449, 456, n. 6, 230 Cal.Rptr. 901, (1986) (noting that "The Government Code defines 'public employee' as 'an employee of a public entity,' (Section 811.4) and 'public entity' as including 'the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.' (Section 811.2)"). Alvarez maintains that the rule of *Gill v. Epstein*, 62 Cal.2d 611, 617-18, 44 Cal.Rptr. 45, 401 P.2d 397 (1965), that imprisonment proximately caused by false arrest, including imprisonment after a lawful arraignment, is compensable as a "natural consequence of a false arrest" has survived *Asgari* and controls his case.

We agree with the district court that *Asgari* overruled *Gill*. The *Asgari* court's discussion of parallels to a New York case based on causation indicates that it meant for its holding to be read broadly. *Asgari* stated that its holding was consistent with *Broughton v. State*. *Broughton's* limitation on liability was based not on state immunity principles, but rather on the grounds that "an action for false imprisonment redresses the violation of plaintiff's freedom of movement and not freedom from unjustifiable litigation, therefore[,] attorney's fees are not proximate after arraignment or indictment and hence not recoverable." *Broughton v. State*, 37 N.Y.2d 451, 373 N.Y.S.2d 87, 335 N.E.2d 310, 316 (1975); *see also County of Los Angeles v. Superior Court*, 78 Cal.App.4th 212, 92

[4] The *Asgari* court also relied on Cal. Gov. Code § 820.4, which immunizes "public employees" from actions based on false arrest.

Cal.Rptr.2d 668, 675 (2000) (explaining that *Asgari* overruled *Gill*). Therefore, we hold that *Asgari* is not limited to public employees. *Asgari* applies here, and Alvarez's damages are limited to his time in Mexico.

Accordingly, we AFFIRM the district court's judgment with respect to Sosa's liability under the ATCA, the substitution of the United States for the individual DEA defendants, the choice of federal common law to determine damages, and the limitation of damages to Alvarez's time in captivity in Mexico. However, we REVERSE the district court's dismissal of Alvarez's FTCA claims against the United States and REMAND the case for a determination of the United States' liability. The dismissal of Alvarez's claims against Garate-Bustamente is GRANTED. No party to recover costs on appeal.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 93-4072 SVW (SHx)

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court conducted a bench trial in this case on May 19 and July 1, 1999. In the interim the Court viewed several hours of excerpts from Plaintiffs deposition and considered the briefs of the parties. After the close of the trial, the Court requested further briefing from the parties regarding damages. The record in this matter is now complete. Based on all of the evidence adduced at trial and in accord with Fed. R. Civ. P. 52(a), the Court now enters its findings of fact and conclusions of law.

I. Findings of Fact

Excerpts of Record

This action arises out of the investigation and prosecution of federal criminal offenses based upon the February 1985 kidnaping, torture and murder of Drug Enforcement Administration ("DEA") Special Agent Enrique Camarena-Salazar ("Camarena") in Guadalajara, Mexico. Numerous individuals were arrested and prosecuted, both in the United States and in Mexico, for the kidnaping, torture and murder of Camarena. *See generally, United States v. Caro-Quintero,* 745 F. Supp.

599, 601-02 (C.D. Cal. 1990), *aff'd,* 946 F. 2d 1466 (9th Cir. 1991), *rev'd,* 504 U.S. 655 (1992).

After being abducted outside the American Consulate in Guadalajara, Mexico, Camarena was tortured and killed at a residence then owned by Rafael Caro-Quintero and located at 881 Lope de Vega, also in Guadalajara. The plaintiff Humberto Alvarez-Machain ("Alvarez" or "plaintiff') admits that he was present at this location during the time that Camarena was being held there. November 18-21, 1998 Deposition of Humberto Alvarez-Machain ("Alvarez Dep.") at 356; Plaintiffs Responses To Defendant United States Requests for Admission ("Plaintiff's Admissions (U.S.)") at ¶ 1.

On January 19, 1990, the Honorable Edward Rafeedie issued a warrant for the arrest of Alvarez on charges of aiding and abetting and kidnaping in violation of 18 U.S.C. §§1201(a)(5) and 2. Exhibit No. 211. None of the information presented to Judge Rafeedie to obtain the abovementioned warrant was provided by defendant Jose Francisco Sosa ("Sosa"). Declaration of Jose Francisco Sosa ("Sosa Dec.") at ¶ 4.

In January 1990, a federal grand jury empaneled in the Central District of California was investigating the circumstances surrounding the kidnaping, torture and murder of Special Agent Camarena. On January 30, 1990, the grand jury returned a Sixth Superseding Indictment ("Indictment") charging Alvarez and others with various federal criminal violations in connection with the kidnaping and murder of Special Agent Camarena and his pilot Alfredo Zavala-Avelar. A bench warrant for the arrest of Alvarez was issued upon the return of the Indictment. Plaintiff's Statement of Genuine Issues of Material Fact in Dispute in Opposition to Defendant Sosa's Motion for Summary Judgment ("Plaintiff's Admissions (Sosa)") at ¶ 4. None of the evidence presented to the

grand jury to obtain the above-mentioned Indictment was provided by Sosa. Sosa Dec. at ¶ 4.

In late 1989 and early 1990, the DEA engaged in discussions with various individuals, including controlled informants and operatives then working for the DEA in the United States and Mexico, regarding an effort to apprehend Alvarez in Mexico and to return him to the United States to answer the criminal charges that had been filed against him. These discussions contemplated that the actual apprehension of Alvarez in Mexico would be carried out for the DEA by Mexican nationals. The DEA headquarters approved the use of Mexican nationals to arrest Alvarez in Mexico and to transport Alvarez to the United States. Plaintiff's Admissions (Sosa) at ¶ 5.

The DEA discussions with Mexican nationals regarding the arrest of Alvarez were conducted for the DEA by, or under the direct supervision of, DEA Special Agent Hector Berrellez ("Berrellez"), the agent in charge of the DEA investigation of the Camarena murder in the Los Angeles Division. In conducting these discussions with the Mexican nationals, Berrellez was assisted by Antonio Garate ("Garate"), a long-time, salaried DEA operative who was a DEA employee at the time of the events in issue here. When Garate pursued his contacts in Mexico to enlist assistance in arresting Alvarez, Garate was acting on behalf of the DEA. Plaintiff's Admissions (Sosa) at ¶¶ 6-7.

One such Mexican national who was contacted by DEA for assistance in arresting Alvarez and bringing him to the United States was Ignacion or "Ignacio" Barragan ("Barragan"). Barragan was then a former Mexican law enforcement officer living in Juarez, Mexico. Garate traveled to Mexico to meet with Barragan and to discuss the plan to arrest Alvarez. Barragan agreed to recruit Mexican nationals to arrest Alvarez on behalf of the DEA. Plaintiff's Admissions (Sosa) at ¶ 8.

Sosa was born in Mexico in June 1947. In April 1990, he was 43 years old, approximately 5 feet 6 inches tall, and of average weight. At that time, Sosa had not held full-time employment for a number of months. Sosa's last full-time employment position, prior to April 1990, was with a branch of the Mexican Federal Police that investigates illegal gaming and lottery activities. Sosa Dec. at ¶ 2.

In or about March 1990, Sosa was contacted by Barragan. Sosa knew that Barragan had previously served as a senior customs official in Juarez, Mexico, and believed that Barragan worked as an agent for the DEA in Mexico. Sosa Dec. at ¶ 3.

Barragan asked Sosa to participate in an operation to arrest Alvarez for the DEA. Sosa did not personally know Alvarez and, prior to his discussions with Barragan, had not previously communicated any information about Alvarez to U.S. law enforcement authorities. Barragan told Sosa that the DEA in Los Angeles had obtained a warrant for the arrest of Alvarez, and that Barragan was organizing a group to arrest Alvarez in Guadalajara, Mexico and to bring him to the United States. Barragan told Sosa that the DEA would pay the expenses of the arrest operation and, if the operation was successful, the DEA would recommend Sosa for a position with the Mexican Attorney General's Office. In his conversations with Sosa, Barragan emphasized the importance to the DEA that Alvarez-Machain not be abused or harmed during the arrest operation. Sosa Dec. at ¶ 4.

Sosa agreed to participate in the arrest of Alvarez in Mexico and to assist in delivering him to the United States. Sosa believed that he was employed with the DEA and would receive DEA direction through Barragan. Barragan instructed Sosa to travel to Guadalajara where others engaged by Barragan were gathered. Barragan provided Sosa with the name and telephone number of the point of contact in Guadalajara who, Sosa understood, was related to Barragan.

Sosa does not recall the name of that individual, and refers to him as Barragan's relative. Sosa believed that Barragan's relative also was working for the DEA. Sosa Dec. at ¶¶ 5, 7.

In late March 1990, Sosa traveled to Guadalajara and there met approximately six individuals—Barragan's relative and four or five others. One of the individuals was a female and the others were males. All were Mexican nationals. Sosa knew only one of these individuals prior to this meeting in Guadalajara, a person who also came from Mexico City named Covarrubias. Sosa Dec. at ¶ 6.

The members of the group that was formed to arrest Alvarez took direction from Barragan (by telephone), and from his relative, regarding a plan to take Alvarez into custody. In these directions, it was emphasized again that Alvarez-Machain must not be harmed during the arrest. The plan was to take Alvarez into custody at his medical office in Guadalajara at the end of the day when there were no patients present. It was a further part of the plan to drive Alvarez from Guadalajara to Leon where the group would transport Alvarez by private plane to the United States. Sosa Dec. at ¶ 7.

On April 2, 1990, at about 7:00 or 8:00 at night, four or five of the men who were members of the arrest group entered the medical office of Alvarez and took him into custody. None of the men were dressed as police officers. Sosa Dec. at ¶ 8. One of the men told Alvarez that there was a warrant for Alvarez' arrest. Alvarez Dep. at 319-320. Alvarez offered no resistance at this time, or at any point while in custody in Mexico. *Id.* at 258. While the men were armed, they did not display their weapons, nor did they carry large machine guns. The Court finds Ana Maria Ibarraran Alvarez's testimony to the contrary entirely incredible as described below. Alvarez was escorted out of the medical office to a waiting car. Alvarez asked if he was being taken to the United States, but no one in the arrest group answered him at

this point. There was a police station within a few blocks of the medical office. Alvarez did not cry out or attempt to draw attention to himself or the arrest group while he was being escorted out of his office to the waiting car. Sosa Dec. at ¶ 8.

At the time of Alvarez' arrest in Guadalajara on April 2, 1990, a warrant for his arrest, issued by a judicial officer of the United States of America, was outstanding. Plaintiff's Admissions (U.S.) at ¶ 17; Alvarez Dep. at 321. Plaintiff does not dispute that the warrant was supported by probable cause.

On the evening of April 2, Alvarez was driven to a house owned by Barragan's relative where he was held in custody for approximately two hours. Sosa was not present for some portions of the time that Alvarez was held at the house. Sosa Dec. at ¶¶ 9-10. Alvarez is unable to identify Sosa as being present at the Guadalajara house at all. Alvarez Dep. at 324, 326, 344-45.

Other than Alvarez' own testimony, which for the reasons explained below the Court finds not credible, there is no evidence that Alvarez was tortured or abused at the house in Guadalajara. Alvarez contends that he received an injection while in the house in Guadalajara, and Sosa subsequently overheard Alvarez and one of the other Mexican nationals speaking about an injection. Sosa Dec. at ¶¶ 10, 16. However, there is no credible evidence that an injection ever occurred. In fact, Alvarez never complained of an injection while in Mexico, Sosa Dec. at ¶ 10, or in El Paso. Meza Dec. at ¶¶ 6, 8-9; Martyak Dec. at ¶¶ 3-4. Alvarez does not contend that he was shocked, injected, or struck at any time after he left the house in Guadalajara on the night of April 2, 1990. Alvarez Dep. at 325-326, 331-32.

Alvarez was driven from Guadalajara to Silao, a small town near the Leon airport, where Alvarez was held in custody at a motel for the rest of the night of April 2, 1990 and part of the next morning. Sosa Dec. at ¶¶ 11-13; Alvarez

Dep. at 334. Once at the motel in Silao, Alvarez laid down on one of the beds and used the bathroom whenever he wanted during the night. Alvarez Dep. at 335. Alvarez was offered and accepted water at the motel. *Id.* Although Alvarez did not eat at the motel, he was not denied food. *Id.* at 337-338.

At about midday on April 3, 1990, Alvarez was taken by taxicab from the Silao motel to the Leon airport. Alvarez Dep. at 338. Alvarez was met at the Leon airport by Barragan's relative and two other members of the arrest team. Sosa Dec. at 1 15. He was escorted through the pubic portion of the airport terminal, through the metal detectors, and out to the runway where a private plane was waiting. *Id.* In addition to the pilot, the plane was occupied by Alvarez, Barragan's relative, Sosa and two other members of the arrest team. The plane departed from Leon in the early afternoon of April 3, 1990. During the flight, Alvarez spoke to Barragan' s relative who said that he was working for the DEA. Alvarez said that he had tried several times to contact the head DEA agent in Guadalajara but had not been successful. Sosa Dec. at ¶ 16.

The plane transporting Alvarez landed in E l Paso later in the afternoon of April 3, 1990. There, Alvarez was delivered to the custody of DEA Special Agent Berrellez and others, including DEA Special Agents Reynaldo Sepulveda, Marty Martinez, and Delbert Salazar, who were waiting on the runway where the plane stopped. Sosa Dec. ¶ 17; Salazar Dec. ¶¶ 5-9; Sepulveda Dec. at ¶¶ 7-8. When Alvarez exited the plane, Agent Berrellez informed him, in the Spanish language, that he was under arrest. Salazar Dec. at ¶ 9. Alvarez indicated that he was glad to be in the United States so that he could clear his name. Salazar Dec. at ¶ 10; Martinez Dec. at ¶ 4. The DEA agents at the airport saw no evidence that Alvarez had been hurt, reported that he walked without a limp, and noted that Alvarez acted pleasant and did not seem upset. Salazar Dec. at ¶¶ 10-11; Martinez Dec. at ¶ 4; Sepulveda Dec. at ¶ 9.

Immigration and Naturalization Service ("INS") Agent Ronnie Ayers was also present to meet the plane at the El Paso airport in order to conduct the INS processing required whenever an alien enters the United States. Ayers Dec. at ¶ 6. Soon after Alvarez stepped off the plane, Ayers interviewed him on the tarmac in the Spanish language, obtaining required biographical information. *Id.* at ¶ 11. During this conversation, Alvarez was polite and accommodating, did not appear emotionally upset, and neither voiced any complaints regarding his treatment while in the custody of the arrest team nor requested food, water, or any other assistance. *Id.* Alvarez did not appear to Agent Ayers to be disheveled or abused in any way; his gait was normal and no bruises or cuts were visible on the exposed areas of his skin. *Id.* at ¶ 10.

The group who had delivered Alvarez from Mexico to El Paso, including Sosa, was required to return immediately to Mexico, and the plane carrying the group departed only a few minutes after it had landed. Sosa Dec. at ¶ 17. Sosa was not present in El Paso at any time during the events occurring during plaintiffs interrogation and confinement there during the period April 3, 1990 through April 10, 1990. *Id.* From the time that Alvarez was taken into custody at his medical offices in Guadalajara on the night of April 2, 1990, until he was delivered into the custody of Berrellez and the other officials at the El Paso airport, less than twenty-four hours had elapsed. *Id.;* Plaintiffs Admissions (Sosa) at ¶ 27.

Shortly after arrival at the El Paso airport Alvarez was transported to the El Paso DEA offices by car. Salazar Dec. at ¶ 12. Once there, Alvarez was placed in an interview room, and read his *Miranda* rights in the Spanish language. Sepulveda Dec. at ¶ 10; Salazar Dec. at ¶ 13; Martinez Dec. at ¶ 5. Alvarez indicated that he understood each of the rights as they has been explained to him. Sepulveda Dec. at ¶¶ 10, 14. Agent Berrellez then informed Alvarez that the DEA agents wanted to ask him some questions about the Camarena

kidnaping. *Id.* at ¶ 11. The interview was not confrontational, and throughout his interview at the DEA offices, Alvarez emphasized his willingness to cooperate. *Id.*; Salazar Dec. at ¶ 13; Martinez Dec. at ¶ 5; Sullivan Dec. at ¶ 5. Alvarez never reported to the agents that he had been tortured or mistreated while he was being brought from Mexico to the United States. Martinez Dec. at ¶ 6; Salazar Dec. at ¶¶ 11-13.

While at the DEA offices, Alvarez was photographed from head-to-toe to document that he had not been mistreated or tortured. Sepulveda Dec. at ¶ 13. Alvarez displayed no resistance to this process. *Id.* Agent Sullivan, who actually took the photographs, saw no cuts, scrapes, scratches, bruises, handcuff marks, or other signs that Alvarez had been injured, abused, or mistreated in any way. Sullivan Dec. at ¶ 7. Further, the developed photographs show no evidence of any external injuries. Exhibit No. 208.

Alvarez was transported to the El Paso County Jail on the night of April 3, 1990 for overnight detention. Sepulveda Dec. at ¶ 15. Agent Martinez and another agent from the DEA's El Paso office drove Alvarez to the El Paso County jail. stopping on the way to buy two hamburgers because Alvarez indicated that he was hungry. Martinez Dec. at ¶ 7. Alvarez was turned over to the custody of officers at the El Paso County jail, where he was booked and signed in under his own name. *Id.* at ¶ 9.

On the night of April 3, 1990, Alvarez was held in the El Paso County jail pending arraignment by the federal court in El Paso. The following morning, Alvarez complained of chest pains and was taken from the El Paso County jail, by ambulance, and admitted to Thomason General Hospital in El Paso. Alvarez Dep. at 290-291.

Alvarez was a patient at Thomason General Hospital from April 4 to April 6, 1990. Meza Dec. at ¶¶ 6-7. During that time he was examined and attended to by doctors and nurses

who communicated with Alvarez in the Spanish language. Alvarez Dep. at 292, 294-295. Alvarez was able to communicate with the Thomason medical staff whenever he needed medication or to report a particular pain or problem. *Id.* at 300. Dr. Armando Meza was one of the physicians who examined and treated Alvarez, and who spoke to Alvarez in the Spanish language. Meza Dec. at ¶¶ 5-6. Dr. Meza impressed Alvarez with his skill and knowledge. Alvarez Dep. at 297. Alvarez never reported to anyone at Thomason General Hospital that he had been shocked, injected or abused during and following his arrest in Guadalajara on April 2, 1990. Alvarez Dep. at 287, 309.

On April 5, 1990, at 4:30 p.m., federal district judge Emilio M. Garza commenced an arraignment hearing, with the assistance of a Spanish language interpreter, at Alvarez' bedside at Thomason General Hospital. April 5, 1990 Hearing Transcript ("Hr'g. Tr."), Exhibit No. 230. After the reading of the Indictment had begun, and Judge Garza had entered a plea of "not guilty" on all counts of the Indictment, the hearing was adjourned when Alvarez reported that he was feeling too ill to proceed with the hearing. *Id.* Alvarez never reported during this April 5 hearing that he had been shocked, injected or abused during and following his arrest in Guadalajara on April 2, 1990. *Id.*; Alvarez Dep. at 287, 309.

On April 6, 1990, Alvarez was released from Thomason General Hospital and transferred to the infirmary at La Tuna Federal Corrections Institute ("La Tuna") in El Paso. Alvarez Dep. at 302. Alvarez was a patient at the La Tuna infirmary from April 6 to April 10, 1990. Martyak Dec. at ¶¶ 3-4. During that time he was examined and attended to by doctors and nurses, including Dr. Thomas Martyak. *Id.* The La Tuna medical personnel communicated with Alvarez in the Spanish language. *Id.*; Hubble Dec. at ¶¶ 5-6. Alvarez never reported to anyone at La Tuna that he had been shocked, injected or

abused during and following his arrest in Guadalajara on April 2, 1990. Martyak Dec. at ¶¶ 3-4; Alvarez Dep. at 287, 309.

On April 9, 1990, at the La Tuna infirmary, federal district judge Emilio M. Garza presided over the reading of the Indictment, the acceptance of Alvarez' plea of not guilty, and a hearing that established the identity of the accused as the Humberto Alvarez-Machain named in the Indictment. April 9, 1990 Hr'g. Tr., Exhibit No. 231; Alvarez Dep. at 306-309. Alvarez never reported during this April 9 hearing that he had been shocked, injected or abused during and following his arrest in Guadalajara on April 2, 1990. Alvarez Dep. at 287, 307-309.

Alvarez was transported by United States Marshals from El Paso to Los Angeles where he appeared before Judge Rafeedie on April 10, 1990. At that time the Court conducted a detention hearing and entered an order that Alvarez be held without bond pending trial. April 10, 1990 Hr'g. Tr., Exhibit No. 232. During the April 10 hearing, Alvarez addressed Judge Rafeedie, but Alvarez did not report during that hearing that he had been shocked, injected or abused during and following his arrest in Guadalajara on April 2, 1990. *Id.* at 19.

On April 19, 1990, Alvarez appeared again before Judge Rafeedie. On this occasion, the Court conducted a motions hearing which also was attended by co-defendant Juan Matta-Ballesteros. Alvarez Dep. at 313-317. During this hearing, Alvarez concedes that he may have heard Matta-Ballesteros' claim that he had been mistreated, and shocked with an electrical device, when he was brought to the United States. *Id.* at 316-317. It has previously been found that Alvarez was, in fact, present in the courtroom when Matta-Ballesteros made these claims of mistreatment. October 19, 1992 Hr'g. Tr., Exhibit No. 233.

On May 25, 1990 Judge Rafeedie conducted an evidentiary hearing on Alvarez' motion to dismiss the Indictment for outrageous government conduct and for lack of personal jurisdiction on the ground that the manner in which his presence was secured allegedly violated the extradition treaty between the United States and Mexico. At that hearing, Judge Rafeedie heard testimony from a number of witnesses, including Alvarez. Alvarez testified regarding the torture and abuse to which he was allegedly subjected when taken into custody in Mexico. On August 10, 1990, Judge Rafeedie entered an Order which rejected Alvarez' clams of torture and abuse as "not worthy of belief" and "simply not credible." *United States v. Caro-Quintero,* 745 F. Supp. at 605-06. During a later proceeding in the case Judge Rafeedie, referring to the basis for his August 10, 1990 ruling, described Alvarez' allegations of mistreatment as completely contrived and adoptive of similar allegations that had been made by co-defendant Matta-Ballesteros. October 19, 1992 Hr'g. Tr., Exhibit No. 233. The August 10, 1990 Order, however, did direct that Alvarez be returned to Mexico on the ground that the seizure of Alvarez in Mexico violated the U.S.-Mexico extradition treaty. *Caro-Quintero,* 795 F. Supp at 614.

On the appeal of the United States, the Order of the district court dismissing the Indictment was affirmed by the Ninth Circuit. *United States v. Alvarez-Machain,* 946 F. 2d 1466 (9th Cir. 1991). However, the Supreme Court granted the government's petition for certiorari and reversed. The Court held that the arrest of Alvarez by Mexican nationals acting on behalf of U.S. law enforcement officials did not violate the U.S.-Mexico Extradition Treaty, and did not deprive the district court of jurisdiction. *United States v. Alvarez-Machain,* 504 U.S. 655 (1992).

On remand from the Supreme Court, Alvarez renewed his allegations of torture and abuse in applying to the Ninth Circuit to dismiss the Indictment on grounds of outrageous

and shocking government conduct. The Ninth Circuit denied Alvarez' application, holding that the findings of the district court-that the allegations of torture and abuse were not credible-precluded the claim that the circumstances of Alvarez' "kidnaping" were outrageous or shocking. *United States v. Alvarez-Machain*, 971 F.2d 310, 311 (9th Cir. 1992).

The trial of Alvarez and his co-defendant Ruben Zuno Arce commenced on December 1, 1992. On December 14, 1992, following the presentation of the government's case, Judge Rafeedie dismissed all charges pending against Alvarez pursuant to Fed.R.Crim.P. 29(a) and ordered Alvarez discharged from custody the following day.

Findings

The Court finds that the record evidence set forth above is credible and reliable, and the Court hereby adopts this evidence as its findings of fact as if fully set forth herein.

Alvarez recalls who Sosa is and that Sosa testified at a pretrial hearing in Alvarez' criminal case. Alvarez Dep. at 344. Alvarez is unable to identify Sosa as one of the individuals who, Alvarez alleges, shocked and injected Alvarez, pointed a gun at or otherwise assaulted Alvarez, or threatened him. *Id.* at 344-345. Alvarez is unable to identify Sosa even as someone who may have touched Alvarez gently on any part of his person during the time that Alvarez was in custody in Mexico in April 1990. *Id.* at 345.

There is no credible evidence that Sosa ever pointed a gun at Alvarez, struck or applied force of any kind to Alvarez, threatened Alvarez, or questioned or interrogated Alvarez about his involvement in the Camarena murder or in any other wrongdoing. There is no credible evidence that Sosa ever applied an electric shock apparatus to Alvarez, or injected him, or that anyone else mistreated or threatened Alvarez. There is no evidence in the record that Sosa, or any of the other members of the arrest team in Mexico, ever

interrogated plaintiff, or even mentioned the Camarena matter, during the time that plaintiff was in their custody in Mexico.

The Court did not find plaintiff to be a credible witness. Plaintiff declined to appear personally to testify, and presented his version of events through videotaped deposition testimony. Plaintiff's demeanor, as observed by the Court via the videotaped deposition, simply was not credible.[1]

That plaintiff is not a believable witness was confirmed by the numerous instances that plaintiff lied during his deposition, including lies-later admitted by Alvarez-regarding the absence of any marital problems, Alvarez Dep. at 186-87; the duration of his separation from his wife, *id.* at 194-95; the reason why his wife was living in the United States, *id.* at 361-62; his knowledge of his wife's statements to the press regarding plaintiff's relations with narco-traffickers and the Alvarez' marital problems, *id.* at 362, 368-69; the passage of time since his wife's last visit to the United States, *id.* at 369-70; and plaintiffs knowledge of cocaine possession by Caro-Quintero or other evidence of his narco-trafficking activities. *Id.* at 394-96. Plaintiff also has attempted to mislead the Court in sworn declarations he has submitted. In a sworn declaration, Plaintiff claimed he did not report the alleged torture by his captors to the staff at La Tuna because none of the medical personnel there spoke Spanish. September 18,

[1] The Court can and does take into account plaintiff's failure to testify in person at trial in determining the weight to give plaintiff's testimony. *Glaverbel Societe Anonyme v. Northlake Marketing and Supply, Inc.*, 139 F.R.D. 368, 370 (N.D. Ind. 1991). Discounting plaintiff's version of events because of his failure to testify in person at trial is particularly appropriate, given his admitted belief that he could testify falsely outside the United States and not be subject to punishment for such false testimony. Alverez Dep. at 391-92. Although the Court could consider this evidence in discounting Plaintiff's testimony, the Court does not rely on this as a basis for rejecting Plaintiff's testimony. Rather Plaintiff's unconvincing deposition testimony caused the Court to disbelieve Plaintiff.

1992 Alvarez Dec., Exhibit No. 237 at ¶ 33. In fact, Dr. Martyak spoke to plaintiff at La Tuna through a Spanish language interpreter, Martyak Dec. at ¶ 3, and numerous members of the La Tuna staff at the time were bilingual. Hubble Dec. at ¶¶ 5-6.

The Court does not believe plaintiffs testimony regarding his allegations of mistreatment. As explained above, the Court generally found plaintiffs testimony unworthy of belief. The Court finds plaintiffs testimony incredible even without considering the other impeaching factors discussed above.

In addition, plaintiffs testimony was contradicted by other evidence and, in many instances, was inconsistent with common sense and human experience. For example, plaintiffs testimony that one of his captors pointed a gun at plaintiffs head in his medical office, Alvarez Dep. at 541, is not credible for a variety of reasons. Plaintiff has conceded that he offered no resistance when the men directed that he go with them, *see* ¶ 14 above, and there is evidence of record that a police station was located nearby plaintiffs medical office. *Id.* The use of a weapon in these circumstances would not be necessary or logical. Moreover, even plaintiffs niece, whose declaration conflicts with plaintiffs in other material respects, does not corroborate plaintiff's claim that one of the men put a gun to plaintiffs head when they took him into custody. Ibarraran Alvarez Dec. at p. 2. As mentioned above, the Court finds Ms. Ibarraran Alvarez's testimony entirely incredible and disbelieves her testimony that the men carried large weapons, brandished weapons in plaintiffs office, or carried large weapons with them into the street.

The Court also rejects plaintiffs testimony that he was punched in the stomach by Covarrubias while exiting the car outside the house to which plaintiff was taken in Guadalajara, Alvarez Dep. at 331, 544. Again, Plaintiff has conceded that he offered no resistance at any time that he was

in the custody of the men who seized him, *see* ¶ 14 above, and thus the use of such force against plaintiff would have been unnecessary. Moreover, it would have been illogical for members of the arrest team to assault plaintiff in public and thereby risk calling attention to the arrest operation.

The Court also rejects plaintiff's testimony that he was shocked with an electrical device and injected while in the house in Guadalajara, or anywhere else in Mexico. First, plaintiff cannot identify any motive for such gratuitous violence in circumstances where he never resisted his captors, *see* ¶ 14 above, and was never interrogated by them. Indeed, it is counter-intuitive that Alvarez would have been subjected to such mistreatment where the Mexican nationals had received specific instructions not to harm Alvarez, and the reimbursement of their expense and any potential reward would be dependent upon compliance with those instructions. Second, there is no physical evidence of abuse to corroborate plaintiff's claim. Rather, the consistent and credible testimony of multiple witnesses who observed Alvarez upon his arrival in El Paso is that his appearance and demeanor were inconsistent with the kind of abuse Alvarez has alleged. Third, plaintiff made no report of abuse or mistreatment when he sought and received medical treatment in El Paso. Fourth, plaintiff never claimed that he was abused until well after he arrived in Los Angeles, and after he had the opportunity to hear such claims of mistreatment being advanced by a co-defendant. Fifth, the Court finds plaintiff incredible as a witness based on its perception of plaintiff's deposition testimony.

In considering these particular allegations, the Court credits the testimony of Dr. Armando Meza that he examined plaintiff carefully at Thomason General Hospital shortly after plaintiff's arrival in El Paso, found no evidence of abuse, and received no report from the patient that any such abuse had occurred. Meza Dec. at ¶¶ 5-10. Moreover, Dr. Meza's

testimony that he spoke to plaintiff in his native language, and that many members of the hospital staff who administered to plaintiff also were bilingual, shows that plaintiff had ample opportunity to report to his caretakers any abuse or injury he had incurred. *Id.* Indeed, plaintiff even admitted he was impressed with Dr. Meza's skill and knowledge. Alvarez Dep. at 297. Thus, there was no legitimate reason for plaintiff not to confide in Dr. Meza. The Court also credits the testimony of Dr. Thomas Martyak and Physician's Assistant Kenton Hubble regarding the treatment of plaintiff at La Tuna infirmary from April 6-10, 1990. Martyak Dec. at ¶¶ 3-4; Hubble Dec. at ¶¶ 3-6. This testimony also demonstrates the absence of any physical evidence of abuse, and shows the ample opportunity plaintiff had to report any alleged abuse to his bilingual caregivers.

The Court also believes it is significant that plaintiff made no report about the alleged abuse to *anyone*, including his own lawyers, until well after his arrival in Los Angeles. Plaintiff was represented by counsel, including a Spanish-speaking attorney, at his arraignment in El Paso. April 9, 1990 Hr'g. Tr., Exhibit No. 231. Plaintiff also spoke with his appointed counsel prior to his initial hearing in Los Angeles. April 10, 1990 Hr'g. Tr., Exhibit No. 232. Indeed, plaintiff even addressed the Court directly during that initial appearance. *Id.* at 19. Yet, plaintiff concedes, it may have been as long as several weeks after his arrival in Los Angeles that he first told his own lawyer about the alleged abuse in Mexico. Alvarez Dep. at 309, 313-14. By this time, of course, plaintiff would have become aware of the allegations of mistreatment being made by his co-defendant Matta-Ballesteros. October 19, 1992 Hr'g. Tr. at 60, Exhibit No. 233; Alvarez Dep. at 315-17. Even plaintiff acknowledges that his initial report to his lawyer of the alleged abuse in Mexico may not have been made until after plaintiff had learned of his co-defendant's allegations of abuse. Alvarez Dep. at 313. In these circumstances, the Court finds that

plaintiff's allegations of mistreatment are adoptive of the allegations made by Matta-Ballesteros, and are completely contrived.

II. Conclusions of Law

The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1350. Plaintiff only had four claims remaining at the time of trial: (1) kidnapping, (4) arbitrary detention, (6) assault and battery, and (8) intentional infliction of emotional distress. The Court previously granted summary judgment in Plaintiff's favor on the kidnapping and arbitrary detention claims. *See* March 18, 1999 and May 18, 1999 Order. Accordingly, the Court need only resolve the issue of damages on those claims.

For the reasons outlined above, the Court FINDS for Defendant Sosa on Plaintiff's sixth cause of action for assault and battery. The Court FINDS that Plaintiff did not suffer any assault or battery from the time of his in seizure in his office in Guadalajara until his delivery to United States officials in El Paso.[2].

In addition, the Court FINDS for Defendant Sosa on Plaintiff's eighth cause of action for intentional infliction of emotional distress. The Court rejects Plaintiff s claims of abuse in Mexico, and the Court previously concluded that California law would immunize Defendant for the emotional distress based on the arrest itself. *See* March 19, 1999 Order. As discussed in note two, Plaintiff will already recover for the

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[2] As the Court noted in its March 18, 1999 Order at note 39, the Court concludes that the simple amount of force to effectuate the arrest does not establish liability for assault and battery. In addition, as with Plaintiffs eighth claim below, Plaintiff will recover for the entirety of the conduct involved in his kidnapping through damages based on his first and fourth claims.

kidnapping and detention, including a fuller panoply of potential damages, through his Alien Tort Claims Act causes of action.[3]

The Court must now turn to a discussion of the proper damages under the Alien Tort Claims Act. The Court has two major areas to discuss in fashioning a remedy. First, as the Court announced at the beginning of the trial in this matter, Defendant Sosa only faces liability for the period from Plaintiff's kidnapping in Mexico until Defendant and others delivered Plaintiff to the authorities in the United States. Second, the Court must determine what law of damages to apply to that period and establish the proper amount of compensatory and, if applicable, punitive damages.

A. Defendant Sosa's Liability Stopped at the U.S. Border

After the Court granted summary judgment in Plaintiff's favor with respect to the kidnapping and arbitrary detention claims, the parties each briefed the issue of the scope of damages. Plaintiff claimed that Defendant Sosa's actions led to Plaintiff's detention in the United States for a significant period of time and that Plaintiff should receive a damage award which covers the entire period. Defendant countered that damages should cease at the time Defendant turned Plaintiff over to United States authorities in El Paso because at that point the actions of domestic law enforcement broke the chain of causation and created an independent basis for Plaintiff's detention. At the start of the Court trial on May 19, 1999, the Court announced its agreement with Defendant's view and limited damages to the point at which domestic law enforcement took Plaintiff into custody.

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[3] In fact, Plaintiffs post trial damages brief does not even pursue his common law claims (six and eight). *See* Plaintiff's Supplemental Trial Memorandum Re Measure of Damages (seeking damages only under the Alien Tort Claims Act).

The facts of this case raise troubling questions in attempting to fashion a remedy. The parties analyze the issue by examining false imprisonment cases. The Court agrees that those cases provide some insight into the scope of damages. However, two unique factors of this case limit the utility of the false imprisonment model-and these two factors lead in opposite directions.

On the one hand, Defendant Sosa cannot argue that Plaintiff's imprisonment and trial in the United States were unforeseeable. There were, in fact, the clearly foreseeable results of his actions. Defendant Sosa knew that United States authorities would arrest, indict, and attempt to try Plaintiff upon Plaintiff's arrival in this country because that was the very reason that the United States hired Sosa in the first place.

On the other hand, none of Defendant Sosa's actions served as a basis for Plaintiffs detention and subsequent trial. In the traditional false arrest case, the defendant misleads the police or the prosecuting attorney and thereby causes an improper arrest and prosecution. By contrast, Defendant Sosa did not provide information which led to Plaintiffs arrest. Instead, domestic authorities had already obtained a valid indictment and arrest warrant at the time of Plaintiffs arrival.

Together, these facts present an very anomalous situation: the government could not have arrested and tried Plaintiff without Sosa's assistance in bringing Plaintiff to the United States, but the United States would have arrested Plaintiff as soon as he arrived in the country regardless of who brought him here or what that individual told the authorities.

The Court agrees with Defendant that, in this situation, the lawful arrest warrant and indictment broke the chain of causation from Defendant's actions to Plaintiffs continuing injuries. Federal cases dealing with false arrest and imprison-

ment establish this principle. In an early case, the Ninth Circuit explained that

> Filing of a criminal complaint immunizes investigating officers such as the appellants from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time. This presumption may be rebutted, however. For example, a showing that the district attorney was pressured or caused by the investigating officers to act contrary to his independent judgment will rebut the presumption and remove the immunity. Also the presentation by the officers to the district attorney of information known by them to be false will rebut the presumption. These examples are not intended to be exclusive. Perhaps the presumption may be rebutted in other ways.
>
> . . . Authorities from other circuits lend some support for this position. Thus it has been held that the filing of charges under certain circumstances does break the chain of causation between an arrest and prosecution.

Smiddy v. Varney, 665 F.2d 261, 266-67 (9th Cir. 1981) ("*Smiddy I*") (citations omitted). The Eleventh Circuit focused on this causation analysis in *Barts v. Joyner*, 865 F.2d 1187 (1989). In *Barts*, the court commented that "[w]e reject plaintiff's contention that she is entitled to damages for her criminal trials, conviction, incarceration, and the resulting aggravation of her Rape Trauma Syndrome. The intervening acts of the prosecutor, grand jury, judge and jury-assuming that these court officials acted without malice that caused them to abuse their powers—each break the chain of causation unless plaintiff can show that these intervening acts were the result of deception or undue pressure by the defendant policemen." *Id.* at 1195.

A number of other courts have reached this result. *See Reed v. City of Chicago*, 77 F.3d 1049, 1053 (7th Cir. 1996) (finding that indictment broke the chain of causation from actions of detectives); *Ames v. United States*, 600 F.2d 183, 185 (8th Cir. 1979) (holding that grand jury indictment breaks chain of causation); *Dellums v. Powell*, 566 F.2d 167, 192 (D.C. Cir. 1977) (noting that independent prosecutorial decision breaks chain of causation); *Rodriquez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc) (explaining that decision of magistrate or grand jury breaks causal chain); *Dabbs v. State*, 59 N.Y.2d 213, 218 (1983) (holding that damages for false imprisonment cease at arraignment); *Barnes v. District of Columbia*, 452 A.2d 1198 (D.C. 1982) (disallowing a claim for attorney's fees from defending the underlying action in a suit for false arrest and imprisonment).

The most recent California Supreme Court case on the subject appears to reach a similar conclusion. *Asgari v. City of Los Angeles*, 63 Cal.Rptr.2d 842 (Cal. 1997). Asgari, a former Iranian wrestler, defected to the United States. Before the Olympic trials, in which he had a significant chance of succeeding, the police arrested him for possession for sale of one pound of heroin. Ultimately, Asgari won an acquittal; nevertheless, he spent seven months and six days in jail and missed the Olympic trials. After his acquittal, Asgari sued for false imprisonment and obtained a verdict of over one million dollars. The *Asgari* court explained that

> Plaintiff contends that his false imprisonment "continued from the date of his arrest to the date of his release from prison" more than seven months later. That is incorrect. Plaintiff's false imprisonment ended when he was arraigned in municipal court on the felony complaint seven days after he was arrested. At that point, plaintiff s confinement was pursuant to lawful process and no longer constituted false imprisonment.

Id. at 850.

Reese v. Geneva Enterprises, 1997 WL 214864 (D.D.C.), used the same causation analysis in a situation conceptually similar to the one at bar. In *Reese*, the government suspected that automobile dealerships in the Washington, D.C., area had assisted drug dealers in laundering money. A sting operation led to the prosecution of several of the employees of the Geneva Enterprises dealership. One employee, after obtaining his acquittal, sued Geneva because he felt that "Geneva believed that the undercover officer was a drug dealer, but nonetheless referred the officer to him as legitimate customer without warning him." *Id.* at *1. The *Reese* court held that Reese could not establish proximate causation between Geneva's conduct and the damages Reese suffered from his prosecution. The court, citing *Dellums*, explained that "the grand jury's indictment of Reese was an independent event which broke any causal connection between Geneva's actions and Reese's injury. Thus, Reese is unable to demonstrate, as he must, that Geneva's actions proximately caused his injury." *Id.* at *8.

The *Reese* court added:

> Reese argues that Geneva's conduct was the "but for" cause of his damages: "without Geneva's conduct, no indictment of Reese would ever have taken place." However "but for" causation is only one element of the proximate cause which must be shown to hold a defendant liable for injuries caused by his conduct. The proximate cause of an injury "is one which, in its natural and continual sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred."

Id. at * 8 (citations omitted).

Plaintiff resists these cases on two grounds. First, he claims that the cases almost always involve law enforcement officers and thus the decisions really rely on immunity, not causation.

Second, Plaintiff offers other false imprisonment cases in which plaintiffs recovered damages for the entire length oftheir detention. The Court will deal with these arguments in turn.

Plaintiff is correct that many of the cases cited above rely on the idea of official immunity for police officers. In *Asgari*, for example, the Court explicitly dealt with statutory immunity and the broader language cited above might represent mere dicta. However, in the relevant footnote in the opinion, the *Asgari* Court cited a New York case, *Broughton v. State*, 37 N.Y.2d 451, 459 (N.Y. 1975), which does not rely on the concept of immunity at all. This suggests that the California Supreme Court would apply the *Asgari* rationale more broadly. Similarly, in *Smiddy I*, the Ninth Circuit explicitly mentioned the need to protect police officers. Nevertheless, the court used the language of causation, not solely immunity, to explain its result.

Plaintiff fails to account for the other cases discussed above. While some cases such as *Smiddy I* and *Asgari* do include discussions of immunity, other cases explicitly rely on the lack of causation. In *Barts*, for example, one section of the Eleventh Circuit's opinion dealt with immunity. In a later section, entitled "Damages," the court held that damages ceased at the point of an independent decision of a prosecutor or grand jury. In *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988), the court discussed the concept of immunity and causation together:

> "a man [is] responsible for the natural consequences of his actions." This principle led the Supreme Court in *Malley v. Briggs*, to hold that the issuance of an arrest warrant will not shield the police officer who applied for the warrant from liability for false arrest if "a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." The

> Court was speaking of immunity but its discussion is equally relevant to causation, as indeed is implied in a footnote to the Court's opinion.

Id. at 993-94 (citations omitted). The Court concludes that persuasive authority exists for the proposition that the independent act of charging authorities breaks the chain of causation such that damages cease to accrue with respect to the individual who made or caused the arrest.[44]

Plaintiff's citation to other cases does not convince the Court that Plaintiff should recover from Defendant Sosa for Plaintiff's entire detention. Plaintiff offers a number of older state cases in which courts allowed recovery for damages for the entire period of detention. In some of those cases the actions of the defendants led to a period of incarceration before any sort of independent hearing. *See, e.g., Collins v. Jones*, 131 Cal.App. 747, 753 (1933) (observing "no showing nor is there a claim made that any person had the right or authority to release plaintiff before a hearing after she was once detained by order of the defendant"); *Kenyon v. Hartford Accident & Indem. Co.*, 86 Cal.App. 269, 273 (1927). In those situations, the Court agrees that a plaintiff should recover for the length of detention, and other damages which arise during that detention, because no independent decision broke the causal chain. However, to the extent that Plaintiff offers any case which suggests recovery for a period of time after the independent decision of a prosecutor or grand jury, the Court follows the number of more recent and better reasoned federal cases on this point.

Plaintiff's case presents a truly unique situation. The Court does not condone Defendant Sosa's actions which the Court has already found to have violated international law. Nevertheless, the Court cannot conclude that Plaintiff can recover

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[4] In this case, that decision occurred, as reflected in the indictment and arrest warrant, before Plaintiff's kidnapping in Mexico.

damages against Sosa for Plaintiff's entire detention in the United States. As the Court noted at the outset, Defendant Sosa took no action which caused Plaintiffs arrest. In the typical false arrest case, a police officer arrests an individual without probable cause or a private citizen provides false or misleading information to the police which causes an arrest. This case stands one step removed from that situation because domestic law enforcement officers performed a lawful arrest based on a valid warrant and indictment. Defendant Sosa certainly made the arrest possible by bringing Plaintiff to the United States, but the arrest and detention occurred for entirely independently, and lawful, reasons.

The Court also notes that Plaintiffs view of the law creates the potential for highly inequitable results. Under Plaintiffs analysis, had Plaintiff been convicted and sentenced to a long term of incarceration, perhaps even a life sentence, Plaintiff would recover damages from Defendant Sosa for each day Plaintiff served pursuant to a validly imposed sentence.

For all of the reasons outlined above, and as described at the May 19, 1999, trial, the Court LIMITS the scope of Plaintiffs damages to the events up to the point at which United States authorities took Plaintiff into custody in El Paso pursuant to a valid warrant and indictment.

B. Establishing a Proper Amount of Damages

Defendant Sosa concedes, as he must, that he faces liability for kidnapping and arbitrary detention in violation of international law under the Alien Tort Claims Act. *See* March 18, 1999 and May 18, 1999 Orders. Instead, Defendant Sosa argues that Mexican law should govern the damages measure in this case because the events occurred in Mexico. Defendant Sosa also claims that if the Court does not apply Mexican law, it should at least reject the imposition of punitive damages under the Alien Tort Claims Act for a variety of reasons. Plaintiff concedes that Mexican law would apply in a

case not brought under the Alien Tort Claims Act and that such law would drastically limit the available damages. *See* Plaintiff's Supplemental Trial Memorandum Re Measure of Damages at 1 n.l. Thus the Court must initially determine what law to apply and then consider the appropriate damage measure.

The Eleventh Circuit has explained that "the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law. Congress, of course, may enact a statute that confers on the federal courts jurisdiction over a particular class of cases while delegating to the courts the task of fashioning remedies that give effect to the federal policies underlying the statute." *Abebe-Jira v. Negewo*, 72 F.3 d 844, 848 (11th Cir. 1996) (citations omitted). *See also Filartiga v. Pena-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) *(Filartiga II)*.

The Court declines to apply the Mexican law of damages to this action. While the events at issue took place in Mexico between, for purposes of this stage of the suit, two Mexican citizens, the Court finds that the application of Mexican law would "inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States." *Filartiga II*, 577 F. Supp. at 864. Judge Nickerson considered exactly this situation on remand from the Second Circuit after that court's landmark decision in *Filartiga*, 630 F.2d 876 (2d Cir. 1980). In *Filartiga II*, Judge Nickerson first looked to Paraguayan law to determine a remedy and concluded that Paraguayan law, with its damages limitations, did not provide an appropriate measure of damages. 577 F. Supp. at 864. Earlier in the opinion, Judge Nickerson commented that "there is no basis for adopting a narrow interpretation of Section 1350 inviting frustration of

the purposes of international law by individual states that enact immunities for government personnel or other such exemptions or limitations." *Id.* at 863.

The Court finds the same analysis relevant in this case: Mexican law would cap the amount of damages and prevent the consideration of punitive damages. Defendant Sosa's position would hold that even if Defendant had held Plaintiff for a period of ten years, Plaintiff could recover no more than fifty or one hundred thousand pesos. The Court concludes that the use of federal common law remedies, including the possibility of punitive damages, best serves the ends of the Alien Tort Claims Act. The Court's reading also follows the limited case law on this subject: courts routinely apply federal common law and consider punitive damages in section 1350 suits. *See e.g., Abebe-Jira*, 72 F.3d at 848; *Paul v. Avril*, 901 F. Supp. 330 (S. D. Fla. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162, 198 (D. Mass. 1995).[5]

The Court must now determine an appropriate amount of compensatory damages and evaluate whether or not to impose punitive damages.

Compensatory Damages

Plaintiff seeks $150,000 in compensatory damages and cites several cases from section 1983 litigation to suggest the propriety of such an amount. Defendant counters that the amounts in the cases cited by Plaintiff relied on significantly greater showings of emotional distress. As discussed in the

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[5] Defendant Sosa points out that the Ninth Circuit allowed the application of the damages law of the Philippines in *Hilao v. Estate of Marcos*, 103 F.3d 767, 780 (9th Cir. 1996). However, the Ninth Circuit did not squarely address the question of the appropriate law to apply in that case. In addition, this Court's conclusion comports with the Ninth Circuit's action in *Marcos:* there, Philippine law allowed exemplary damages, and its application did not frustrate the remedial purposes of the Alien Tort Claims Act.

findings of fact, the Court concluded that Plaintiff did not experience any mistreatment during his approximately twenty hours in custody in Mexico and Plaintiff provides little evidence about his emotional distress.[66] Plaintiff knew, relatively quickly after his seizure, that his captors were transporting him to the United States. However, the fact remains that Defendant seized Plaintiff in Mexico and held him for a period of twenty hours. Despite the fact that Plaintiff failed to adduce any tangible proof of emotional distress, the Court does not doubt that a kidnapping would produce such distress. Accordingly, the Court, based on the evidence in this case, AWARDS Plaintiff compensatory damages in the amount of $25,000.

Punitive Damages

Defendant Sosa contends that even if punitive damages are available under the Alien Tort Claims Act for kidnapping and arbitrary detention, the Court should not impose such damages in this case. Defendant makes two arguments. First, Defendant argues that the Court should not impose punitive damages because the issue of Plaintiff's claims under the Alien Tort Claims Act presented one of first impression. Second, under federal and California law, Defendant claims that Plaintiff must prove that: (1) Defendant's conduct was sufficient to support a punitive sanction; (2) the sanction would deter Defendant, especially in light of Defendant's financial condition; and (3) the punitive damages bear a reasonable relationship to the injury actually suffered. Plaintiff counters that Defendant knew that his conduct violated the law and that Defendant did so for personal gain.

The Court agrees with Defendant's position and declines to impose punitive damages even though the Court recognizes

[6] As noted previously, Plaintiff has waived all of his claims for damages, such as economic, except for his emotional distress from the events at issue.

its ability to do so. As an initial matter, the Court agrees with Defendant that punitive damages are not appropriate in this case of first impression. As the Court previously noted, no United States court has ever recognized kidnapping as a cognizable claim under the Alien Tort Claims Act and only a few courts have considered arbitrary detention claims under very different circumstances. The Ninth Circuit and California courts have decided that punitive damage awards are inappropriate when the case involves an issue of first impression or a newly established right. *See, e.g., Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1104 (9th Cir. 1992).

This Court's previous Order recognizing a consensus in international law against kidnapping and transborder abduction, *see* March 18, 1999 Order, does not counsel a different result. International law does clearly prohibit transborder abductions. However, Defendant Sosa believed that his actions were valid under United States law, even if he knew that his actions were impermissible in Mexico. Plaintiff did not provide any evidence of Defendant's knowledge of international law on this point. Because of the unsettled state of the law, Defendant Sosa did not have a clear warning of the impropriety of his conduct. For this reason, Plaintiff cannot demonstrate malice or oppression by Defendant Sosa.

In addition, kidnapping and arbitrary detention are not violations of *jus cogens* norms. *See* March 18, 1999 Order. While many courts have imposed punitive damage awards for violations under the Alien Tort Claims Act, those cases have involved the basest of human conduct such as murder, torture, and slavery. The Court does not mean to suggest that transborder abductions are ever permissible instruments of policy, but the Court thinks it obvious that abductions do not offend traditional human decency to the same degree as murder or torture. In sum, while the Court recognizes that the Alien Tort Claims Act would allow the imposition of punitive damages-and that such damages might be properly imposed

with respect to kidnappings in the future-the Court feels that punitive damages are inappropriate in the first case raising the issue.

Independently, the Court finds that the particular facts of this case justify rejecting the imposition of punitive damages. First, Defendant Sosa's conduct, while impermissible and in violation of international law, does not justify punitive damages. Defendant Sosa did violate the law for personal gain. However, Defendant Sosa did so at the urging of the United States government under the belief that his action was lawful based on a warrant and indictment in the United States. Defendant Sosa did not instigate the plan to kidnap Plaintiff, nor was he an important player in the execution of the plan. In fact, Defendant Sosa was one of a team of individuals hired as a second choice to carry out the plan.

Second, punitive damages would not have a deterrent effect. Defendant Sosa need not be deterred. He is now living in the United States as part of the witness protection program and earning a modest amount of money.[7] He cannot return to his home country of Mexico, nor can he even decide where to live within the United States. Punishing Defendant Sosa is also not likely to deter others. It could be that a punitive damage award against Defendant would make low level actors here and abroad think twice before participating in such activities in the future. However, the driving force behind the unfortunate events of this case was the United States. A damage award against the United States provides the only real hope of deterrence, but the court's prior Order forecloses that possibility.

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[7] In fact, while the Court does not have any competent evidence of Defendant Sosa's financial situation, it seems clear that any imposition of punitive damages would create too significant a financial burden. *See, e.g., Adams v. Murakami*, 54 Cal. 3d 105, 119 (1991).

III. Conclusion

For all the reasons outlined above, the Court FINDS for Defendant Sosa on Plaintiff's sixth and eighth causes of action and AWARDS Plaintiff damages on his first and fourth causes of action in the amount of $25,000.

IT IS SO ORDERED.

DATED: 9/9/99

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

[Filed May 18, 1999]

No. CV 93-4072 SVW (SHx)

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

ORDER

Plaintiff's complaint included a claim for prolonged arbitrary detention, which Plaintiff sometimes dubs simply arbitrary detention, based on Plaintiffs arrest in Mexico and subsequent detention by Defendant Sosa and then United States authorities. The Court reserved a ruling on Defendant Sosa's motion for summary judgment with respect to this claim and sought further briefing. In the Court's Order of March 18, 1999, the Court reported that while it appeared that the Court would grant summary judgment for Plaintiff on the arbitrary detention claim, the Court would allow Defendant a further response. The Court also asked the parties to address the interrelation between the arbitrary detention claim and the kidnapping claim on which the Court granted summary judgment for Plaintiff. The parties responded to the Court's Order and the Court further inquired into the matter at the hearing on May 3, 1999.

The Court's analysis of this issue in the March 18, 1999, Order relied largely on *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998). In *Martinez*, the Ninth Circuit explained that "detention is arbitrary 'if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Id.* (citing Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt.h (1987)). The Ninth Circuit rejected the plaintiff's claim in *Martinez* because the authorities arrested Martinez pursuant to law under a valid Mexican arrest warrant and detained him in a manner consistent with acceptable common practice. In the instant case, Defendant Sosa arrested and detained Plaintiff in Mexico without lawful authority.

Plaintiff agrees that the kidnapping claim covers the same action involved in the arbitrary detention claim. Plaintiff also asserts that any amount of time suffices to establish a claim for arbitrary detention. Plaintiff only refers to the claim as "prolonged" arbitrary detention because of the length of Plaintiff's detention in Mexico and his subsequent detention in the United States. The Court will need to establish the scope of damages for the arbitrary detention claim, as it will for the kidnapping claim. The Court discusses that issue below.

Defendant Sosa argues that an arrest without a warrant does not amount to arbitrary detention and that such a holding would create a dangerous precedent. The Court does not suggest that a lawful arrest requires a warrant or that the lack of a warrant amounts to a lack of lawful authority. Defendant Sosa acted without lawful authority in Mexico by arresting Plaintiff on the basis of a warrant issued in the United States, but without a Mexican warrant or other consent of the Mexican government or authorities. The Court's finding that Defendant Sosa kidnapped Plaintiff establishes that Sosa detained Plaintiff without lawful authority.

Defendant Sosa also points out that the *Martinez* court considered the arrest and detention separately. Defendant Sosa correctly describes *Martinez*, but that description does not govern this case. The *Martinez* court decided that the officers made a valid arrest so the court then had to consider whether or not the length or conditions of detention made it arbitrary. In the instant case, the arrest occurred without lawful authority which makes the detention arbitrary regardless of its length or conditions.

Defendant Sosa then claims that the detention did not occur for a long enough period of time to support a cause of action. Sosa cites comment h to the Restatement which concludes: "A single, brief, arbitrary detention by an official of a state party to one of the principal international agreements might violate that agreement; arbitrary detention violates customary international law if it is prolonged and practiced as a state policy."

This concern again raises the question of the proper scope of damages. Simply put, the Court must determine whether Defendant Sosa must face liability for the entire period of time for which Plaintiff was detained in Mexico and the United States, or if Defendant Sosa's liability should cease at the point at which Sosa turned Plaintiff over to United States authorities in El Paso. Both parties at the May 3 hearing informed the Court that the scope of damages affects the evidence which they wish to present at trial. The Court does not know how the evidentiary presentation would differ: Plaintiff has waived economic and psychological damages and the length of Plaintiff's detention could be easily established. However, the Court wants to obtain a complete record before making a decision on the damages issue. For all these reasons, the Court: (1) DENIES Defendant Sosa's motion for summary judgment and GRANTS Plaintiff's motion for summary judgment with respect to Plaintiff's claim for arbitrary detention, as the Court suggested in its

March 18, 1999 Order; (2) ORDERS both parties to proceed with evidence on the full range of potential damages at trial; and (3) RESERVES a ruling on the appropriate scope of damages for Defendant Sosa's kidnapping and arbitrary detention of Plaintiff.

IT IS SO ORDERED.

DATED: 5/18/99

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

[Filed Mar 18, 1999]

No. CV 93-4072 SVW (SHx)

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

ORDER

I. Introduction

The facts of this case are well known to the parties and the courts of the United States and this Court will not belabor them here. In short, in April 1990, individuals acting on behalf of the United States Drug Enforcement Administration seized Plaintiff Alvarez from Guadalajara, Mexico, and brought him to El Paso, Texas, because of Plaintiff's alleged role in the torture and death of DEA Agent Enrique Camarena. The United States had already indicted Plaintiff in Los Angeles, and obtained a warrant for his arrest, based on his alleged role in Agent Camarena's death. After resolving the jurisdictional issue, *United States v. Caro-Quintero*, 745 F. Supp. 599, 601 (C.D. Cal. 1990), *aff'd sub nom United States v. Alvarez-Machain*, 946 F. 2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 665 (1992), the case proceeded to trial and the district court granted Plaintiff's motion for acquittal.

On July 9, 1993, Plaintiff filed the instant suit and alleged eleven causes of action against the United States and various

individual defendants. Defendants moved to dismiss the complaint. Judge Davies, the previous judge handling the matter, granted the motion in part and denied the motion in part. *See* Memorandum Opinion Regarding the Defendant's Motions to Dismiss and to Substitute, filed January 20, 1995. The Ninth Circuit affirmed in part, reversed in part, and remanded the matter back to the district court. *Alvarez-Machain v. United States*, 107 F.3d 696 (9th Cir. 1997). This Court received the case after Judge Davies retired from the bench. The parties then filed a number of motions. Plaintiff filed a motion for partial summary judgment against the United States and a motion for partial summary judgment against Defendant Sosa. Defendant Sosa and the United States moved to substitute the United States for Defendant Sosa pursuant to 28 U.S.C. § 2679 ("Westfall Act"). Finally, Defendant Sosa, Defendant United States, Defendant Garate-Bustamante, and Defendants Berrellez, Gruden, Lawn, and Waters, all filed motions for summary judgment. The Court held a hearing in this matter on March 1, 1999.

II. Defendant Sosa's Motion for Substitution

Defendant Sosa argues that the Court should substitute the United States in his place with respect to Plaintiff's non-constitutional claims pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act). 28 U.S.C. § 2679.[1]

The Westfall Act allows the Attorney General to certify an individual's status as an employee acting within the scope of his or her employment and thereby substitute the United States in his or her place as a defendant, except with respect

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[1] Judge Davies' past Order substituted the United States for Defendants Berrellez, Waters, Gruden, and Lawn. Plaintiff subsequently stipulated to the substitution of the United States for Defendant Garate-Bustamante. Thus, of the individual Defendants, only Defendant Sosa remains in this regard.

to constitutional claims or claims with respect to the violation of certain federal statutes. 28 U.S.C. § 2679(b). In this case, Helene Goldberg, Director of the Torts Branch of the Civil Division of the Department of Justice, has on two occasions [2] certified that Defendant Sosa acted as an employee within the scope of his authority at all times relevant to this suit. *See* Sosa's Motion to Substitute, Exh. A.; United States' Motion to Substitute, Exh. A.

Certification by the Attorney General settles the issue unless challenged. *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995). Plaintiff challenges the certification of the Attorney General and argues that Sosa was not an "employee" of the United States, but merely an independent contractor. Plaintiff bears the burden of disproving the Attorney General's certification and the determination of "employee" status relies on federal law. *Id. See also Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993).

The Federal Tort Claims Act defines employees of the government as "persons acting or behalf of a federal agency in an official capacity, temporarily permanently in the service of the United States, whether with or without compensation." 28 U.S.C. § 2671. The Supreme Court has explained that independent contractors do not fall within this broad definition of "employees." *United States v. Orleans*, 425 U.S. 807 (1976); *Logue v. United States*, 412 U.S. 521 (1973). The distinction between an employee and an independent contractor depends on "the existence of federal authority to control and supervise the 'detailed physical performance' and

[2] Judge Davies initially denied Sosa's motion for certification without prejudice so that Plaintiff could undertake discovery into the matter. The Attorney General, through Ms. Goldberg, certified Sosa a second time on February 3, 1999, after the close of discovery. The Court notes that while Ms. Goldberg signed her certification as "2/3/98," it is clear from the text and the time of submission that she meant "2/3/99" and simply made a mistake in writing the year.

'day-to-day operations' of the contractor, and not whether the agent must comply with federal standards and regulations." *Ducey v. United States*, 713 F.2d 504, 516 (9th Cir. 1983) (quoting *Orleans*, 425 U.S. at 814-15). *See also Will v. United States*, 60 F.3d 656, 659 (9th Cir. 1995); *Carrillo v. United States*, 5 F.3d 1302, 1304 (9th Cir. 1993).

In *Logue*, the Supreme Court explained the term "employee" by examining the definition of "servant" in the Second Restatement of Agency, section 220. 412 U.S. at 527. The Restatement lists the following factors:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and 0) whether the principal is or is not in business.

The Ninth Circuit has adopted this approach, but has not considered a situation similar to Defendant Sosa's. The so-called "informant" cases provide the closest analog. In *Slagle v. United States*, 612 F.2d 1157, 1159-61 (9th. Cir. 1980), the court agreed with the district court's conclusion that the government informant at issue was not an employee. The court adopted the lower court's reasoning that the government had no right of control nor actual control" of the informant. *Id.* at 1161. In *Slagle*, the informant at issue volunteered to

work for the government pursuant to very lax oversight in which the informant would create his own assignments. In the event which led to liability in the case, the informant, carried a gun in violation of agency policy and set out on a trip to gather information without receiving approval from anyone in the agency.

By contrast, in Leaf v. United States, 661 F.2d 740 (9th Cir. 1981), the court approved the decision of the district court which considered an informant an agent of the government.[3] Bean, the informant in the case, volunteered to perform undercover operations on behalf of the government. The court explained that Bean undertook the actions at issue with "full knowledge and approval of his supervisors." *Id.* at 741.

The Ninth Circuit attempted to harmonize these two cases in *Wang v. Horio*, 45 F.3d 1362 (9th Cir. 1995). In *Wang*, the court stated that "[g]enerally an informant is not a government employee. Sometimes someone 'who is not the run-of-the-mill informant' may be found to be one." *Id.* at 1364 (citations omitted). The district court in *Wang* had initially deemed the informant an employee but the Ninth Circuit reversed and remanded so that the district court could hold a more complete evidentiary hearing. On remand, the district court again found employee status and then ordered the United States, which had resisted certification, to pay fees to the informant. That fee award served as the basis of the appeal cited above, 45 F.3d 1362, and the Ninth Circuit only decided to reverse the award by concluding that the government's position that the informant was not an employee was substantially jusfied. The district court's decision, which remains intact on this point, held that the

[3] While the opinion in *Leaf* did not explicitly classify the informant as an "employee," the opinion did call the informant an agent and then proceeded to consider other defenses under the Federal Tort Claims Act. Thus, despite some imprecision, the court's finding does apply to the interpretation of "employee."

informant was an employee despite the fact that the IRS repeatedly told him he was not an employee, he did not receive any compensation, he could have withdrawn at any time, and, in fact, he had a full time job with the individuals against whom he provided information.

Plaintiff's evidence demonstrates that Defendant Sosa did not serve as an employee of the government in the actions involved in this case.[4] Plaintiff explains that Defendant Berrellez asked Defendant Garate-Bustamante, a salaried DEA operative, to arrange for Plaintiff's removal from Mexico. Garate, in turn, communicated with a man named Ignacio Barragan, now deceased, who was a former member of Mexican law enforcement. Garate enlisted Barragan to hire individuals to seize Plaintiff and transport him to the United States. The record clearly demonstrates that the DEA, through Berrellez and Garate, instructed Barragan to (1) hire Mexican law enforcement personnel to perform the task and (2) command those individuals not to harm Plaintiff on his trip to the United States. Garate Depo. at 158, 207-08; Berrellez Depo. at 102-04. In addition, the DEA only planned to pay for the operation upon Plaintiff's arrival in El Paso unharmed. Garate Depo. at 173; Berrellez Depo. at 104. Berrellez and Garate learned after the fact that Defendant Sosa was one of the individuals hired by Baragan who participated in Plaintiff's seizure and trip to the United States. Berrellez Depo. at 97-98; Garate Depo. at 205-206.

[4] Sosa argued that the Court could not consider Plaintiff's arguments that Sosa was not an employee of the government due to the law of the case and Plaintiff's own pleadings. The Court disagrees. No court in the history of this litigation has found that Sosa was an employee of the government. Only Judge Davies faced the question; he denied Sosa's motion for substitution on the state of the record at the time and rejected the same arguments for estoppel. Order at 32-33. Both sides describe Sosa's relationship in different ways at different times. Nevertheless, Sosa could be an "agent" of the government without being an "employee."

Plaintiff submits that this chain of events shows that the government did not have the "authority to control and supervise the 'detailed physical performance' and 'day-to-day operations"' of Sosa or the "arrest team" before or during the operation in Mexico. Plaintiff contends that while Plaintiff bears the burden of disproving Sosa's employment, the record remains bereft of any evidence of the authority to control the operation. The Court agrees. The record shows that Garate maintained frequent contact with Barragan and that Berrellez spoke directly with Barragan on the phone on four or five occasions. Garate twice traveled to Mexico to meet with Barragan. Nevertheless, despite the government's degree of control over Barragan,[5] Plaintiff offers convincing evidence that no government employee had any degree of control or authority to control the actions of Sosa.[6]

Neither Garate nor Berrellez knew any of the details of the plan to seize Plaintiff in Mexico. The record reflects that Barragan called Garate on April 2, 1990. Barragan informed Garate that the team had custody of Plaintiff. Plaintiff's counsel asked Garate in Garate's deposition, "[p]rior to that call, did you have any information that the operation was going to take place on April 2nd?" Garate answered "[n]o sir. The operation-he was already on his way. Whenever it

[5] Due to Barragan's death, the Court has not had the opportunity to consider the employment status of Barragan. The Court has serious questions about whether it could classify Barragan as an employee for purposes of the Westfall Act. Nevertheless, the parties have not urged the Court to decide that question and the record reveals little about what degree of control Barragan exercised over the operation in Mexico. Thus the Court will examine the authority or actual control of the government employees in this case: Garate and Berrellez.

[6] Sosa argues that under the approach of *B & A Marine Co. v. American Foreign Shipping Co.*, 23 F.3d 709, 713 (2d Cir. 1994), the government can exercise its control directly or through an intermediary. The Court need not reach that issue because no individual in the government's chain of authority above Sosa had the authority to control Sosa's actions.

happens, happens." Garate Depo. at 214. Berrellez also admitted that he did not know any of the plan surrounding the details of the arrest. Berrellez Depo. at 147. Garate and Berrellez did not have any further contact with the arrest team until after the plane touched down in El Paso and they did not even know the names of the individuals involved until after the fact. Garate Depo. at 206, 212; Berrellez Depo at 117. As Plaintiff aptly describes the issue in his brief, "Garate simply put the entire operation in Barragan's hands." Plaintiff's Opposition to Defendant Sosa's Motion for Substitution at 6. The record demonstrates an utter lack of actual control or even the right to control the detailed physical performance of Sosa's actions.

In addition, while the Court finds the factors in the Second Restatement of Agency difficult to apply in the informant setting, the listed factors which might apply also suggest that Sosa acted as an independent contractor. The Court has already discussed the most critical factor, extent of control, above. The United States did not supply any of the instrumentalities or tools for the operation. In fact, Garate stated in his deposition that he told Barragan at one point that "it had to be a strictly Mexican operation. We cannot even give them chewing gum. They have to come up with everything." Garate Depo. at 188. In addition, Sosa performed a one time service which took little time and the United States planned to compensate him for the job as a whole, not pay by the hour.[7]

[7] Sosa argues that the statutory definition. preempts these two provisions of the Restatement. Section 2671 provides that one may serve as an employee "temporarily or permanently in the service of the United States, whether with or without compensation." The Court agrees that this language allows a court to find an individual an employee of the government even if that person acted for a short period of time without compensation. However, the statute does not suggest that those factors do not relate to the determination of employee status. Sosa cites no authority for that proposition, nor does the Court know of any such authority. The Court feels that the statute merely applies the Restatement in this context: length

The parties could not have believed that they were creating a master and servant relationship. While Sosa hoped that the DEA would pay him and provide a recommendation for his future employment, Sosa never communicated with anyone in the United States government and the government did not even know Sosa's identity until well after the fact.

The remaining factors do not seem to apply in this setting: the Court cannot conclude whether or not Sosa was "engaged in a distinct occupation or business," whether the work "is usually done under the direction of the employer or by a specialist without supervision," the skill required, whether the work "is a part of the regular business of the employer," or whether or not the principal "is or is not in business."[8]

In short, the DEA sought individuals who could work in Mexico to bring Plaintiff to the United States. Government employees gave explicit instructions on the person it wanted seized, the background of those who would seize him, and how those individuals should treat him during his trip to the United States. At a later stage, government employees instructed the arrest team where to fly the plane and obtained clearance for the plane to land. Beyond that, the government turned the operation over to the team of individuals and had no idea how or when the arrest would occur, or even the identities of those who made the arrest. The government did not control the operation, nor did it assert any right to do so.

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of employment and compensation are factors, but not decisive factors, in the determination of employee status.

[8] The Court suspects that this sort or covert operation is not a 'distinct business," that it is "often done by a specialist without supervision," that it requires some skill, that while arrests are part of the regular business of the DEA, covert arrests in another country are not, and that the DEA is not "in business" as defined in the Restatement. Nonetheless, the Court finds these particular categories more relevant to the typical employment context and the record does not contain enough information for the Court to decide these issues.

The government wanted the fruits of the plan (Plaintiff's arrest in the United States) but did not involve itself, in any meaningful way, in the plan itself. For this reason, the Court finds that under the Ninth Circuit's "control" test, or even the broader test of *Logue* and the Second Restatement of Agency, Defendant Sosa was not an employee. Accordingly, the Court DENIES the motion to substitute by Defendant Sosa and Defendant United States.

III. Defendant Bellerez, Gruden, Lawn, and Waters' Motion for Summary Judgment and Defendant Garate-Bustamante's Motion for Summary Judgment

Plaintiff asserts *Bivens* claims against all of these individual Defendants. At the outset of the case, Plaintiff based his claims on the alleged violation of the Fourth, Fifth, and Eighth Amendments, for Defendants' actions during the entire range of the operation: from Plaintiff's arrest in Mexico through his detention in the United States. Judge Davies dismissed the *Bivens* claims arising out of conduct in Mexico. He reasoned that the Eighth Amendment did not apply to any of the conduct at issue and that the Fourth and Fifth Amendment did not apply extraterritorially. Order at 26, 40-42. The Ninth Circuit affirmed, although on a different ground. *Alvarez*, 107 F. 3d at 702. The Ninth Circuit relied on its own finding, which it made on remand from the Supreme Court in Plaintiff's criminal case, that no conduct in Mexico violated Due Process. *Id.* While Plaintiff asserts that he might still possess *a Bivens* cause of action for the plan to kidnap him in Mexico in violation of United States and international law, he agrees that Judge Davies decided this issue and does not seek to relitigate it here. Notice of Non-Opposition to Motion for Summary Judgment on Plaintiff's *Bivens* Claims Filed by Defendants Berrellez, Gruden, Lawn, and Waters at 1. Plaintiff also conceded his ability to pursue *a Bivens* claim based upon his "treatment during his interrogation in Texas." Memorandum of Points and Authorities in Partial Opposition

to Defendant Garate-Bustamante's Motion for Summary Judgment at 2.

Thus, at this stage in the litigation, Plaintiff only advances a "narrow" *Bivens* claim relating to the "Fourth or Fifth Amendment claim with respect to the portion of the kidnapping occurring within U.S. territory." *Id.* at 2-3. In short, Plaintiff asserts a claim based upon his unlawful "seizure" by Sosa, an agent of the United States, for the brief distance between the point at which the airplane crossed the U.S. border to its landing at the airport in El Paso, Texas-a distance of less than five miles. Declaration of Hank Webb at 1.

As an initial matter, the Court notes that Plaintiff can only allege *a Bivens* claim based on this allegedly unlawful seizure under the Fourth, not the Fifth, Amendment. *Graham v. Connor*, 490 U.S. 386 (1989); *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996). Plaintiff's claim fails because he cannot demonstrate an unlawful seizure. A grand jury in Los Angeles had indicted Plaintiff for a felony and a judge of this Court had issued a warrant for Plaintiff's arrest. These two facts each independently established the probable cause necessary for a valid seizure under the Fourth Amendment. *Gerstein v. Pugh*, 420 U.S. 103, 113-16 (1975). Thus Defendant Sosa, acting on the behalf of law enforcement agents, seized Plaintiff in the United States pursuant to ample probable cause.

Plaintiff attempts to revive his claim by pointing out that the Federal Rules of Criminal Procedure do not authorize private individuals to execute arrest warrants. Yet a violation of a Federal Rule of Criminal Procedure does not rise to constitutional significance. The simple fact remains that probable cause existed to seize Plaintiff in the United States and Defendant Sosa, at the direction of federal law enforcement, made such a seizure. Plaintiff cannot establish a constitutional violation and thus the Court GRANTS the motion for summary judgment on behalf of Defendants Berrellez, Waters, Gruden, and Garate-Bustamante.[9]

IV. United States' Motion for Summary Judgment

The United States faces liability for the actions of its agents pursuant to the Federal Tort Claims Act. Plaintiff has the following claims remaining against the United States: (1) kidnapping, (3) cruel, inhuman, and degrading treatment, (6) assault and battery, (7) false imprisonment, (8) intentional infliction of emotional distress, (9) false arrest, (10) negligent employment, and (11) negligent infliction of emotional distress.[10] The United States divides Plaintiff's claims into three categories: (1) those relating to Plaintiff's arrest in Mexico and return to the United States (false arrest, false imprisonment, kidnapping, intentional infliction of emotional distress, and negligent infliction of emotional distress); (2) those relating to Plaintiff's treatment in Mexico (cruel, inhuman, and degrading treatment, assault and battery, negligent employment, intentional infliction of emotional distress, and negligent infliction of emotional distress), and negligent

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[9] These Defendants offer a number of other bases in support of their motions. The Court notes that it would almost undoubtably apply qualified immunity to the federal employees with respect to this claim even if Plaintiff could demonstrate a violation of the Constitution. The Court would certainly find that a reasonable officer would have thought that he or she could direct another to make an arrest domestically based on a warrant and an indictment. The Court also finds Defendants' argument fairly persuasive that courts might not even apply Fourth Amendment protection to an individual in Plaintiff's situation. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). The Court does not need to reach those alternative arguments because it finds no violation of the Constitution in Plaintiff's seizure within the United States.

[10] Plaintiff agreed to abandon his claim for torture (number 2). Judge Davies previously dismissed Plaintiffs claim for prolonged arbitrary detention (number 4), and Plaintiff obviously does not assert his *Bivens* claims (number five) against the United States.

infliction of emotional distress), and (3) those relating to Plaintiffs treatment in the United States (intentional infliction of emotional distress and negligent infliction of emotional distress). The Court will adopt this organizational scheme to consider Plaintiff's claims and the defenses offered by the United States.

A. Applicable Law

The Federal Tort Claims Act states that the government faces liability as determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §§ 1346(b), 2672. Federal law determines the scope of the FTCA's exclusions and the determination of who is an "employee" for purposes of the statute. Aside from that, however, "state law ... determines whether the ultimate facts give rise to a cause of action in favor of the claimant. . . . a cause of action based entirely on federal law, and which has no counterpart in state law, is not cognizable under the Tort Claims Act. . . ." Jayson & Longstreth, 2 *Handling Federal Tort Claims* § 9.09(1) at 9-231 (1997) ("Treatise"). The Treatise also notes that "[o]cassionally, state law will incorporate principles of federal law into its tort law, and these principles will be applicable in determining the United States' liability as part of the 'law of the place'." *Id.* at 9-232-33. The Treatise explains that "[a]lthough the general rule dictates that the law of the state where the misconduct occurred governs the liability of the United States, there are some seeming departures from this rule. For example, to the extent that maritime torts are actionable under the Act, they are governed by maritime law." *Id.* at 9-239.

For reasons more fully discussed below, Plaintiff alleges that all of the actions which occurred in Mexico arose from a plan conceived in California. Accordingly, the parties agree that California law applies to the claims for Plaintiffs arrest and treatment in Mexico (category one and two above). Category three depends on actions taken in Texas. The parties

have not announced whether they feel that Texas or California law governs that situation. While the entire plan developed in California, the acts in Texas certainly "occurred" in Texas. The Court feels that Texas law should apply to Plaintiff's claims regarding his treatment in Texas (category three above). As discussed below, however, Texas and California contain virtually identical provisions of law on the issues in question and thus a choice of law analysis would not change the result.

Defendant United States employs the principles of state law at the outset to eliminate some of Plaintiff's claims. First, the United States asserts that California law does not contain a cause action for kidnapping, or cruel, inhuman, and degrading treatment. Defendant notes that it could not find a case in which a California court recognized either tort. Defendant asserts that the tort claims of false arrest or imprisonment and assault and battery provide a remedy for what Plaintiff terms kidnapping or cruel, inhuman, and degrading treatment. Defendant points to one civil case in which the state had previously convicted the defendant of kidnapping, and the plaintiff brought suit for false imprisonment, assault, and intentional infliction of emotional distress. *White v. County of Orange*, 166 Cal.App.3d 566, 568-69 (1985). Defendant adds that the California Book of Approved Jury Instructions ("BAR") does not contain an instruction outlining the elements of either claim.

Second, Defendant argues that California law does not recognize an independent cause of action for negligent infliction of emotional distress, but instead considers such claims through the prism of traditional negligence.[11] *Potter v.*

[11] Defendant also points out that Texas law agrees with California in this respect and does not contain an independent claim for negligent infliction of emotional distress. *Garza v. United States*, 881 F. Supp. 1103, 1108 (S.D. Tex. 1995); *Bowles v. Kerr*, 855 S.W.2d 593, 594, 597 (1993) (en banc). Plaintiff does not address this contention.

Firestone Tire & Rubber Co., 6 Cal. 4th 965, 984 (1993); *Lawson v. Mangement Activities, Inc.*, 81 Cal.Rptr.2d 745, 748 (Cal. App. 4th Dist. 1999). Third, Defendant explains that false arrest and false imprisonment do not constitute separate torts under California law. *Asgari v. City of Los Angeles*, 15 Cal. 4th 744, 752 n.3 (1998); *Collins v. City and County of San Francisco*, 50 Cal. App. 3d 671, 673 (1975).

Plaintiff claims that California law does contain a cause of action for kidnapping and cruel, inhuman, and degrading treatment.[12] Plaintiff's argument consists of two parts. First, principles of international law prohibit kidnapping and cruel, inhuman, and degrading treatment. Second, California law incorporates principles of international law into its common law. Plaintiff contends that several American courts have recognized these torts as actionable and adds that a California court would apply "generally agreed upon principles of international law."[13] Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant United States' Motion for Summary Judgment at 4 ("Opp. to U.S. Summ Judg").

The Court concludes that California law does not recognize the torts of kidnapping or cruel, inhuman, and degrading treatment. While Plaintiff correctly observes that California courts have applied international law to certain discrete situations, such as determining California's territorial jurisdiction, Plaintiff does not cite a single instance in the history of California case law, nor did the Court find an example, in which a California court has incorporated a violation of international law into its domestic law as a tort.

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[12] Plaintiff apparently concedes Defendant's position that California law does not recognize a cause of action for negligent infliction of emotional distress and explicitly agrees that false arrest and false imprisonment constitute one tort.

[13] The Court addresses the issue of international law more fully in section V below, which deals with claims against Defendant Sosa under the Alien Tort Claims Act.

In fact, the cases which Plaintiff cites as examples of situations in which American courts have recognized a prohibition on kidnapping or cruel treatment rely on the Alien Tort Claims Act, discussed in section V below, which explicitly contemplates the use of such law. *Abebe-Jiri v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Paul v. Arvil*, 901 F. Supp. 330 (S.D. Fla. 1994).

In addition, in this circumstance, Plaintiffs claims for false arrest and false imprisonment merge. The Court also concludes that Texas law does not contain a cause of action for negligent infliction of emotional distress. Accordingly, the Court GRANTS Defendant United States' motion for summary judgment with respect to claims one, three, and eleven (kidnapping, cruel, inhuman, and degrading treatment, and negligent infliction of emotional distress). The Court also GRANTS Defendant United States' motion for summary judgment with respect to claim seven or claim nine (false arrest and false imprisonment) to the extent that the motion challenges Plaintiffs ability to maintain the causes of action separately. The Court will consider these causes of action as one for the remainder of the case.

B. Negligent Employment

Plaintiff asserts a negligence claim based on Defendant's failure to investigate the backgrounds of the individuals who seized Plaintiff in Mexico. Plaintiff contends that he faced physical and psychological abuse at the hands of those individuals and that "[h]ad the United States learned the identity of the kidnappers, investigated their backgrounds, or even coordinated the 'arrest' with the Mexican authorities, Plaintiff would not have suffered the injuries he did." Opp. to U.S. Summ Judg at 12-13 (footnote omitted). Defendant argues that Plaintiff cannot demonstrate causation because Plaintiff offers no evidence that the failure to investigate the background of the individuals contributed to Plaintiffs alleged injury.

In California, "[t]o recover on a negligence theory, a plaintiff must prove duty, breach, causation, and damages." *Leslie G. v. Perry & Assoc.*, 43 Cal. App. 4th 472, 480 (1996). However, even if the Court accepts Plaintiff's contention that Defendant had a duty to investigate the backgrounds of the individuals involved in Plaintiffs seizure and that Defendant breached that duty, a causal connection must exist between the breach and the alleged harm to Plaintiff. *Id.* at 481. Under section 430 of the Restatement (Second) of Torts, applied by California courts, the negligence must "be a legal cause of the other's harm." Legal cause exists if the negligence serves as a "substantial factor" in causing the harm. Rest. 2d Torts § 431; *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1052 (1991).

Plaintiff cannot demonstrate that a failure by Defendant to learn the identity or investigate the backgrounds of the individuals in Mexico[14] played a "substantial factor" in Plaintiffs injuries. Plaintiff does not demonstrate that any of the individuals who seized Plaintiff in Mexico and conveyed him to the United States had any indications, such as violence, in their background which would have led the United States to not employ them. In fact, the only evidence in the record demonstrates that Sosa had never faced an investigation or even an accusation of violence or excessive force during his

[14] Plaintiff appears to raise a triable issue of fact regarding whether or not the United States failed to conduct an investigation. Defendant contends that it did not even breach a duty because there is no factual dispute that the government explicitly instructed Barragan to hire law enforcement personnel and to tell those personnel not to injure Plaintiff or even question him. Garate Depo. at 158, 207-08; Berrellez Depo. at 102-04. In addition, Defendant announced that it would not compensate the individuals of Plaintiff arrived in any other condition. Garate Depo. At 173; Berrellez Depo. at 104. Thus Defendant asserts that it took every reasonable precaution to avoid any injury to Plaintiff. The Court does not reach this issue due to Plaintiff's failure to demonstrate causation.

time in Mexico law enforcement, and never engaged in any domestic violence.[15] Sosa Depo. at 21.

Plaintiff adduces no evidence that demonstrates that Defendant's failure to investigate the backgrounds of the individuals involved in the operation in Mexico served as a "substantial factor" in Plaintiff's alleged injuries. This situation resembles *Nola M v. University of Southern California*, 16 Cal. App. 4th 421 (1993). In *Nola M.*, the court reversed a jury verdict in favor of a rape victim against the University of Southern California. *Id.* at 424. The victim had contended that the school negligently failed to deter the attack. The court concluded that the plaintiff did not provide any evidence that "two or ten or twenty more guards or other security measures could have prevented Nola's injuries." *Id.* As in that case, this Court has no evidence with which to conclude that an investigation would have provided any reason not to hire these particular individuals or prevented Plaintiffs injuries. Defendant Sosa's deposition shows that Defendant would have found no signs of violence in his background. Accordingly, the Court GRANTS Defendant United States' motion for summary judgment on count ten (negligent employment).

C. Foreign Claim Exclusion

The Federal Tort Claims Act contains an exception which exempts from coverage "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). Congress created this exception to retain sovereign immunity and ensure that the United States did not face liability under the laws of another sovereign. *Smith v. United States*, 507 U.S. 197, 201 (1993); *United States v. Spelar.*, 338 U.S. 217, 221 (1949). Defendant

[15] In fact, the only reported time in Defendant Sosa's background when he did abuse his power as a member of law enforcement, he solicited a bribe to *not* arrest someone. Sosa Depo. at 19-20.

suggests that the foreign claim exclusion prevents any recovery for Plaintiff based on the events that occurred in Mexico because those claims arose in a foreign country.

Plaintiff counters that the Court must decide Federal Tort Claims Act claims based on the law of the place in which the act or omission occurred, not the place where that act or omission had its "operative effect." *Richards v. United States*, 369 U.S. 1, 10 (1962); *Cominotto v. United States*, 802 F.2d 1127, 1129-30 (9th Cir. 1986). Plaintiff thus advances a "headquarters claim." *Cominotto*, 802 F.2d at 1130; *Leaf v. United States*, 586 F.2d 733, 736 (9th Cir. 1978). Plaintiff's headquarters claim contends that while the actual effects occurred in Mexico, all of the decisions about his seizure and removal to the United States, including Plaintiff's claim for negligent employment, occurred in California.

The Court agrees that Plaintiff has stated a valid "headquarters claim" at least with respect to his claim for false arrest/false imprisonment and intentional infliction of emotional distress from his seizure.[16] Plaintiff's claims in that

[16] The Court notes that a typical headquarters claim involves a situation in which negligence occurs domestically, but the injury from that negligence arises in a foreign country. In that situation, all of the elements of the tort of negligence have occurred in a state and only the injury arises elsewhere. Plaintiff alleges torts which arise from intentional, planned conduct. This situation does not fit the traditional headquarters claim because only the decision to arrest Plaintiff occurred in California, while the actual arrest happened in Mexico. Defendant United States thus offers a plausible distinction between this case and much of the case law: Plaintiff cannot allege that all of the elements of the tort occurred in the United States.

The Court did not find many cases that dealt with a headquarters claim based on intentional conduct. However, that finding does not surprise the Court because, as the Court discusses below, the Federal Tort Claims Act contains a general exception for intentional conduct, except on the part of law enforcement officers. Thus only a case like Plaintiffs could raise this question. Nevertheless, the D.C. Circuit did consider a similar situation in

regard resemble those asserted in a number of cases in which courts have found a valid "headquarters claim" and refused to apply the foreign claim exclusion. Most recently, the Eleventh Circuit decided that the failure of the DEA and Customs to coordinate an operation led to the incarceration of a number of individuals in Honduras. *Couzado v. United States*, 105 F.3d 1389, 1394-96 (11th Cir. 1997). In that case, while the actual arrest and injury occurred in Honduras, the court found that the negligent act or omission occurred in the United States. *Id.* A number of other courts have reached similar results where acts or omissions in the United States lead to liability elsewhere. *See Sami*, 617 F.2d at 761-63; *Leaf*, 588 F.2d at 735; *Mulloy v. United States*, 884 F. Supp. 622, 633 (D. Mass. 1995) (accepting a headquarters claim based on the failure to warn or supervise); *Donahue v. United States Dep't of Justice*, 751 F. Supp. 45, 48-49 (S.D.N.Y. 1990) (allowing a headquarters claim for negligence by an informant working in a foreign country); *Glickman v. United States*, 626 F. Supp. 171, 174 (S.D.N.Y. 1985) (finding that a plan developed in the United States but carried out in Paris stated a valid headquarters claim); *In re Agent Orange*, 580 F. Supp. 1242, 1254-55 (E.D.N.Y. 1984) (refusing to apply the foreign claim exclusion to product liability claims when decision to use Agent Orange and development of its technical specifications occurred in the United States).

Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979). The *Sami* court refused to apply the foreign claim exception to plaintiff's claim of false arrest in Germany based on the intentional actions of U.S. government officials in the United States. *Id.* at 761-62. Indeed, a contrary rule would suggest that the United States could face liability for negligent actions of its officials which cause injury in another country but not the intentional acts of its law enforcement officials which cause the same injury. The Court's decision does not run afoul of the underlying policy of the exception—to prevent the United States from facing liability based on foreign law—because the Court does not apply Mexican law to the causes of action.

Plaintiff states a valid "headquarters claim" for his seizure because it stemmed from a plan which developed entirely within the United States. Plaintiff's cause of action for assault and battery and the resulting intentional infliction of emotional distress based on that assault and battery do not raise a "headquarters claim." As set forth above, the undisputed evidence in the record shows that Defendants Berrellez and Garate explicitly instructed Barragan, and thus Sosa, not to harm Plaintiff, or even question him, during his seizure and trip to the United States. In fact, the United States announced that it would not accept Plaintiff, or pay any money for the operation, if Plaintiff appeared harmed in any way upon his arrival in El Paso. The United States formed no domestic plan to assault or batter Plaintiff. Thus, Plaintiff's cause of action arose in Mexico and the foreign claim exclusion bars recovery against the United States.[17] Accordingly, the Court GRANTS Defendant United States' motion for summary judgment with respect to claim six (assault and battery) and the part of claim eight (intentional infliction of emotional

[17] Plaintiff did assert a negligent employment claim, discussed above, in which he suggests that poor planning in the United States led to his injuries. That claim would also provide the same potential for relief for the same injuries Plaintiff alleges in his assault and battery and intentional infliction of emotional distress based on the battery.

The Court adds that the foreign claim exclusion bars almost the entirety of the claim for assault and battery. Plaintiff has contended throughout this case, and the previous criminal trial, that the agents of the government engaged in a variety of abusive acts in Mexico. The foreign claim exclusion, for the reasons above, clearly bars those claims. Plaintiff could assert, however, that the simple touching for the purposes of the arrest, or fright pursuant to the arrest, constitutes an assault and battery which the government's plan explicitly contemplated. Thus Plaintiff might assert a headquarters claim for assault and battery based on the touching incident to the seizure in Mexico. Plaintiff's claim, would survive the foreign claim exclusion if he utilized that theory. The Court will discuss the merits of such a claim, including any privilege to use such minimal force incident to arrest, in subsection E below.

distress) as it relies on claim six. The Court REJECTS the foreign claim exclusion as a basis for Defendant United States' motion for summary judgment with respect to claim seven and nine (false arrest/false imprisonment) and claim eight as it arises from claim seven and nine.[18]

D. Intentional Tort Exception

Defendant argues that the intentional tort exception, prevents liability for Plaintiffs claims of assault, battery, and false arrest/false imprisonment. The Federal Tort Claims Act contains an explicit exception for "any claim arising out of assault, battery, false imprisonment, [or] false arrest" unless the claims arise out of the "acts or omissions of investigative or law enforcement officers of the United States government." 28 U.S.C. § 2680(h). The exception specifically defines "investigative or law enforcement officers" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* Defendant argues, quite simply, that the individuals in Mexico dial not fit within this definition of "investigative or law enforcement officers" and thus Plaintiff cannot state a claim against the United States for assault, battery, or false arrest/false imprisonment.

Defendant cites cases in which courts have found that a variety of federal employees do not fall within the definition: Marine security guards, investigators of the Equal Employment Opportunity Commission, federal magistrates and judges, Assistant United States Attorneys, and parole officers. *See* Memorandum of Points and Authorities in Support or

[18] The Court reaches this conclusion at least as an initial matter. As the Court discusses in subsection E, the Court must decide whether or not Defendant's actions constitute false arrest/false imprisonment based on the "law of the place," in this case California. To the extent that California would utilize foreign law to hold the United States accountable, the policy behind the foreign claim exclusion will arise again.

United States' Motion for Summary Judgment at 20-21 and cases cited *infra*. The Court's research also produced a case in which the court applied the exception to the actions of non-law enforcement individuals who tricked members of law enforcement into an unjustified arrest. *Metz v. United States*, 788 F.2d 1528 (11th Cir. 1986). However, the Court's research did not turn up a case which presented the opposite scenario: a law enforcement officer who directed someone else to perform a false arrest or imprisonment.

Plaintiff offers two basic arguments in response. First, the individuals in Mexico acted as law enforcement officers for these purposes. Second, Plaintiff's claim contemplates liability for the actions of the law enforcement officers in the United States and those individuals should face liability for instructing others to do what the law enforcement individuals could not. Plaintiff couples this argument with the observation that the law enforcement exception to the intentional tort exception exists to protect "innocent victims of Federal law enforcement abuses." *Sami*, 617 F.2d at 764 (quoting S. Rep. No. 588, 93rd Cong., 1st Sess. 3-4 (1973)). The Court finds this second argument persuasive. As noted above, the Court does not know of a case in which a court applied the intentional tort exception to an individual who acted at the direction of a law enforcement office. That result would not make sense: law enforcement officers could enlist private citizens or others to commit torts and thus shield the United States from liability. For this reason, the Court REJECTS the intentional tort exception as a basis for Defendant United States' motion for summary judgment.

E. False Arrest/False Imprisonment

The Court has already found that the exclusions in the Federal Tort Claims Act bar a number of Plaintiff's claims against the United States. The Court must still address, however, Plaintiff's claims for false arrest/false imprisonment

and intentional infliction of emotional distress based on that arrest.[19]

As outlined in subsection A above, the Court must apply the law of the place, California, under the Federal Tort Claims Act.[20] The Court cannot apply federal law, unless California courts would look to federal standards in reaching their decisions; the Court also cannot apply international law, because the Court found that California law does not include torts based on the law of nations. Finally, the Court cannot apply the law of a foreign sovereign, in this case Mexico, due to the foreign claim exclusion and the policy of *Spelar*. Thus the Court must determine how a California court would analyze Plaintiffs tort claims.[21]

California defines a false arrest as an arrest conducted without lawful authority. *See e.g., Scofield v. Critical Care*

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[19] As noted above, Plaintiff may also retain a claim for assault and battery and intentional infliction of emotional distress, but only to the extent required for an arrest.

[20] The Court must apply the whole of California law, which includes it choice of law rules. *Richards v. United States*, 369 U.S. 1 (1962). The Court assumes that California would apply its own, forum law. *Marsh v. Burrell*, 805 F. Supp. 1493, 1496 (N.D. Cal. 1992); *Hurtado v. Superior Court*, 11 Cal. 3d 574 (1974) (en banc). If the Court concluded that California would apply the law of Mexico, then the foreign claim exclusion would bar Plaintiffs claims. *Spelar*, 338 U.S. at 221. *See also* James A. Shapiro, *Choice of Law Under the Federal Tort Claims Act: Richards and Renvoi Revisited*, 70 N.C.L. Rev. 641, 659-60 (1992).

[21] The Ninth Circuit has applied the law of the state for FTCA purposes even when that law was "riddled [] with exceptions and inconsistencies" compared to a rational approach taken by another state. *Epling v. United States*, 453 F.2d 327, 329 (9th Cir. 1971). In addition, when the highest court of a state has not ruled, the district court must "make a reasonable determination, based upon such recognized sourced as statutes, treatises, restatements and published opinions, as to the result that the highest state court would reach if it were deciding the case." *Molsbergen v. United States*, 757 F.2d 1016, 1020 (9th Cir. 1985).

Medicine, Inc., 45 Cal. App. 4th 990 (1996). Defendant argues that the existence of a felony warrant and indictment made lawful an arrest by Sosa at the direction of federal law enforcement. Plaintiff counters that any statutory immunity does not apply to these actions and that malice on the part of the arresting individuals made the arrest unlawful.

California law distinguishes between "peace officers" and private individuals with respect to the ability to make lawful arrests. California Penal Code section 834 provides that a peace officer or a private person can make an arrest. Section 837 states that a "private person may arrest another . . . When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it." Section 836 allows a peace officer to make an arrest "[w]henever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed." The courts of California treat peace officers like private citizens when those peace officers make arrests outside of their jurisdiction.[22] *See e.g., People v. Monson*, 28 Cal. App. 3d 935, 939-40 (1972); *People v. Califano*, 5 Cal. App. 3d 476, 484 (1970). Thus California clearly allows a private citizen or a peace officer to make an arrest pursuant to a valid felony warrant and indictment.

The parties discuss one other provision of California law. Civil Code section 43.55, formerly section 43.5(a), states that "[t]here shall be no liability on the part of, and no cause of action, shall arise against, any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if the peace officer in making the arrest acts without malice and that the person arrested is the one referred to in the warrant."

[22] California law allows the use of some force incident to an arrest. Section 835(a) allows a peace officer to use "reasonable force" to effect the arrest, while section 835 states more generally that the "persons arrested may be subjected to such restraint as is reasonable for his arrest and detention."

Thus California does not allow a suit for false arrest when (1) an officer makes an arrest pursuant to a warrant or (2) when the arrest occurs with lawful authority. In other words, California would not hold a peace officer liable for an arrest pursuant to a warrant valid on its face which later proves deficient; California would also not arrest after a felony had been committed and the individual had reason to believe that the arrestee committed the offense.

These provisions do not provide a complete answer to the question in the instant case. Had a private citizen or a California peace officer arrested Plaintiff in California, a California court would clearly not hold that individual liable for false arrest or imprisonment.[23] Yet Defendant Sosa, at the direction of federal law enforcement, arrested Plaintiff in Mexico pursuant to a valid United States warrant and indictment. The question for this Court then is how a California court would apply principles of California law to that situation. One permutation of this situation might prove instructive. What would a California court do if an individual came into California and arrested a person based on a warrant and indictment issued in another state or another country? While the Court finds this an exceedingly difficult hypothetical inquiry, it concludes that a California court would not hold Defendant Sosa or the federal law enforcement agents liable in this situation.

Plaintiff argues that a California court would draw a decisive distinction at the border of the United States and refuse to approve of an arrest in another country. The Court disagrees. California law approves of arrests made pursuant

[23] Plaintiff points out that the Federal Rules of Criminal Procedure limit the ability to utilize federal arrest warrants to member of federal law enforcement. Nevertheless, the existence of a federal warrant and indictment clearly provides probable cause for any individual to conclude that a felony has been committed and the person named in the warrant may have committed it.

to a warrant or indictment. While California law clearly does not apply outside of its borders, if California considered an extraterritorial arrest through the lens of its own law, it is unclear why the border would make a difference. For instance, California extends reciprocity to law enforcement officers of other states. Penal Code section 852.2 allows a foreign peace officer who enters California in "fresh pursuit" to exercise the same authority to arrest and hold a person in custody as a peace officer of California, provided that the foreign peace officer takes the prisoner before a magistrate in the county of the arrest. In addition, California does not appear to limit the definition of "private person" to only citizens of California.[24] Thus if a peace officer, or any individual, from, another state entered California with the requisite probable cause to arrest an individual, then California would presumably riot consider that action a false arrest.

Plaintiff offers two reasons for rejecting this interpretation of the law of California. First, he argues that the immunity granted by Civil Code section 43.55 does not apply to this situation. Plaintiff cites a few Ninth Circuit cases which seem to indicate that state immunity principles should not limit federal liability under the FTCA. *See Stuart v. United States*, 23 F.2d 1483, 1488 (9th Cir. 1994); *Wright v. United States*, 719 F.2d 1032, 1034-35 (9th Cir. 1983). Defendant counters with specific cases in which the Ninth Circuit has applied state immunity principles to a claim of false arrest under the FTCA. *See Ting v. United States*, 927 F.2d 1504, 1514 (9th

[24] The Court notes that some cases discuss an arrest by a private person as a "citizen's arrest," but it appears that courts use that term in a colloquial sense. *See e.g., Johanson v. Department of Motor Vehicles*, 36 Cal. App. 4th 1209, 1216 (1995); *People v. Taylor, 222* Cal. App. 3d 612, 618-19 (1990). The Court did not find any case in which a California court limited the definition of private person to a citizen of California. That result makes sense; it would create quite an anomaly if a visitor to the state could witness a felony but not restrain the perpetrator even though any other law abiding citizen could do so.

Cir. 1991); *Arnsberg v. United States*, 757 F.2d 917 (9th Cir. 1985).[25] The Court concludes that *Ting* directly governs this situation. Even though the parties have characterized the issue in terms of immunity, these arguments are more properly addressed in the context of a failure of proof. Defendant does not assert "immunity" in the sense used in the cases cited above. Instead, Defendant contends that the actions of the officers and Sosa do not amount to the tort of false arrest because California law considers their actions lawful. Because Plaintiff's arrest did not occur "without lawful authority," Plaintiff fails to satisfy an element of the tort.

Plaintiff's argument falls short for another reason: Civil Code section 43.55 applies to arrests made by peace officers pursuant to a warrant. Defendant does not only claim a defense based on the warrant, but instead says that the existence of the warrant and indictment created probable cause such that any citizen could lawfully arrest Plaintiff. Defendant does not claim that Sosa served the arrest warrant on Plaintiff in Mexico, it only contends that Sosa acted with lawful authority because of his knowledge of Plaintiff's connection to a felony.

Plaintiff also attempts to use the concept of malice to make the arrest unlawful. Civil Code section 43.55, discussed above, requires a peace officer to act without "malice" to receive the protection that the use of a warrant provides. California courts have found "malice" in situations where peace officers have made knowing omissions in obtaining a warrant or executed a warrant with the knowledge that it did not remain in force. *Laible v. Superior Court*, 157 Cal. App.

[25] Plaintiffs counsel admitted at the hearing that these two lines of cases seem to conflict. Nevertheless, he candidly admitted that *Ting* provides the most relevant precedent for the false arrest situation. The Court follows *Ting* in this instance and leaves harmonization of the precedents for a later case which raises the issue.

3d 44, 53 (1984); *McKay v. County of San Diego*, 111 Cal. App. 3d 251, 255-56 (1980); *Milliken v. City of South Pasadena*, 96 Cal. App. 3d 834, 842 (1979).

Plaintiff claims that because Defendant Sosa and the federal defendants knew that a Mexican arrest warrant did not exist, and that a United States federal warrant does not apply outside the United States, the arrest was with malice.[26] Each of these bases fail to demonstrate malice. As discussed above, California does not rely on the valid exercise of a warrant to immunize arrests. In order for a private citizen to make a lawful arrest, that citizen must only know that a felony has occurred and have a reasonable basis to think that the arrested individual committed the crime. The Defendants knew this, even if they could not lawfully exercise the warrant outside of the United States. Plaintiff cannot rely on the lack of a Mexican warrant, because that would make an arrest unlawful based on the law of Mexico-a result foreclosed by *Spelar* discussed above. From the perspective of California law, Defendants knew that a felony had occurred and had reason to think that Plaintiff committed it. That created a basis for an arrest by a peace officer or a private citizen.

The Court notes that this entire inquiry seems somewhat artificial. California has never faced the unusual situation presented in this case and does not have law which appears to address it. The Court finds no indication that California

[26] Section 43.55 provides immunity when an officer acts pursuant to a warrant that is valid on its face. The law attempts to shield officers from liability for executing warrants which later prove groundless or erroneous. That situation does not exist here: Defendants do not rely on a warrant later proven invalid. Neither party disputes that probable cause existed to arrest Plaintiff. The parties only disagree about whether Defendant Sosa could arrest Plaintiff in Mexico. Under California law, however, Sosa, a private citizen, or the law enforcement agents, could make a lawful arrest based on probable cause. Section 43.55 could provide immunity, but Defendants do not rely only on the provisions of that section.

would allow a person in Plaintiff's position to sue a California individual or peace officer for an arrest in Mexico. However, given the possibility that California might allow such a claim, the Court has attempted to examine this situation in significant depth. Perhaps, absent the ability to sue in federal court, a plaintiff in this situation might sue in Mexico. Perhaps, instead, California would look to Mexican law in its choice of law analysis. Unfortunately for Plaintiff, neither position helps him in this case. The Court cannot look to Mexican law, even if the Court concluded that a California court would apply it. Nevertheless, the Court feels that California courts would apply California law and find that the warrant and indictment supported the arrest. Accordingly, the Court GRANTS Defendant United States' motion for summary judgment with respect to Plaintiff's seventh and ninth claim (false arrest/false imprisonment) and Plaintiff's eighth claim with respect to the arrest (intentional infliction of emotional distress. As discussed above, to the extent that Plaintiff's sixth claim (assault and battery) stems from the minimal force needed to arrest Plaintiff, California law does not allow that force to amount to a tort. *See* Cal. Civil Code § 835(a). Thus the Court also GRANTS Defendant United States' motion for summary judgment with respect to Plaintiff's sixth and eighth causes of action based on the use of minimal force or the alleged fear from the use of that minimal force.

F. Events in El Paso

At the outset of the litigation, plaintiff alleged a number of factual predicates in support of his claims for intentional and negligent infliction of emotional distress.[27] He claimed that United States agents threatened him, kept him in a windowless room, photographed him naked, denied him food and

[27] The Court above granted Defendant United States' motion for summary judgment on the negligent infliction of emotional distress claim.

water, and booked him under a false name to prevent contact with his family. The United States argues that it kept him in the windowless room and took the pictures for valid law enforcement reasons; offered him food, water, and sodas; accidentially booked him under a false name and allowed him to call his family; and never threatened Plaintiff. Plaintiff appears to have conceded some of the factual predicates for his claim at the hearing.

In Texas, intentional infliction of emotional distress requires proof that "(1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the actions of the defendant cause the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe." *ITT Consumer Financial Corp. v. Tovar*, 932 S.W.2d 147, 158 (Tex. Ct. App. 1996). *See also Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993). While Defendant cites some persuasive cases on the contours of intentional infliction of emotional distress in Texas, the Court finds that a factual dispute exists regarding the activities in El Paso. Accordingly, the Court DENIES Defendant United States' motion for summary judgment on Plaintiff's eighth cause of action (intentional infliction of emotional distress) with respect to the events in Texas. While the Court above granted summary judgment with respect to Plaintiff's eighth claim arising out of the alleged events in Mexico, the Court will allow Plaintiff to present evidence regarding events in Mexico as background to Plaintiffs claims in Texas.[28]

V. Defendant Sosa's Motion for Summary Judgment

Plaintiff asserts the sale claims against Defendant Sosa as he does against Defendant United States, except those claims arise under common law or the Alien Tort Claims Act, 28

[28] Plaintiff will also be able to introduce evidence and recover for the events in Mexico, if proven, against Defendant Sosa as discussed below.

U.S.C. § 1350. Plaintiff has abandoned his second cause of action for torture against Defendant Sosa. Defendant Sosa moves or summary judgment with respect to all of Plaintiff's claims. Plaintiff also filed a motion for partial summary judgment with respect to his claims under the Alien Tort Claims Act.

A. Alien Tort Claims Act

The Alien Tort Claims Act ("ATCA") provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Congress enacted the Alien Tort Claims Act as part of the First Judiciary Act of 1789, but courts seldom invoked it until recently. The "debates that led to the Act's passage contain no reference to the Alien Tort Statute, and there is not direct evidence of what the First Congress intended it to accomplish." *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 973 F .2d 493, 498 (9th Cir. 1992) ("*Estate I*").

Despite this lack of historical guidance, several prominent opinions have provided a basis for application of the statute. *See, e.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The Ninth Circuit has announced that the statute requires "a claim by an alien, a tort, and a violation of international law." *Estate I*, 978 F.2d at 499. Defendant does not contest that Plaintiff's kidnapping claims meets the first two conditions. Defendant simply argues that kidnapping does not violate clearly established international law.

The Court must interpret the law of nations "not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (quoting *Filartiga*, 630 F.2d at 881). The Court finds these norms by "'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and

enforcing that law.'" *Filartiga*, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)). In order to state a cause of action under the ATCA, the norm of international law must be "specific, universal, and obligatory." *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998) (citing *In re Estate of Ferdinand E. Marcos*, 25 F.3d 1467 (9th Cir. 1994) *(Estate II)*).

Plaintiff has three causes of action which depend on international norms under the ATCA: kidnapping, cruel, inhuman, and degrading treatment, and prolonged arbitrary detention.[29]

1. Kidnapping

While no United States court has ever found "kidnapping" cognizable under the ATCA, two courts have hinted at that result. *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (stating that the "illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort . . . and it may well be a tort in violation of the 'law of nations'" but refusing to reach the issue) (citation omitted); *Jaffe v. Boyles*, 616 F. Supp. 1371, 1378 (W D.N.Y. 1985).[30] Plaintiff characterizes his claim as

[29] Plaintiff devotes much of his brief in support of summary judgment to a discussion of kidnapping. Plaintiff does not move for summary judgment on the other two grounds, but does argue that international norms prohibit Defendant Sosa's behavior under both of them. The Court observes that while a factual dispute may exist about "cruel, inhuman, and degrading treatment," if, in fact, the ATCA allows such a claim, a dispute does not exist about Plaintiffs detention. The parties agree that Defendant Sosa and others detained Plaintiff for approximately twenty four hours before delivering him to United States authorities in El Paso. The Court finds the matter of the prolonged, arbitrary detention claim ripe for summary judgment because no factual dispute exists. As discussed below, however, the Court will not rule on that issue until further discussion at the pretrial conference.

[30] In addition, the Ninth Circuit's recent recognition of prolonged arbitrary detention as a basis for a claim under the Alien Tort Claims Act, see subsection 3 below, reinforces the conclusion that kidnapping does violate

not one merely for kidnapping, but for "state-sponsored abduction within the territory of another state without its consent." Plaintiff cites a wealth of international authority[31] to support the idea that such international abduction violates both the principles of state sovereignty and an individual's right to the security of his or her person in his or her own nation.

Defendant Sosa offers a number of arguments against Plaintiff's position. First, Sosa argues that the Ninth Circuit has already rejected kidnapping as an action which violates international law in *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995). The court in *Matta-Ballesteros* faced the request to dismiss an indictment by another individual removed from his country as part of the Camarena investigation. The Ninth Circuit declined the request and stated that "kidnapping . . . does not qualify as *a jus cogens* norm, such that its commission would be justiciable in our courts even absent domestic law." *Id.* at 764 n.5. However, that footnote only means that kidnapping does not rise to the level of *jus cogens*, or the "highest status within customary international law . . . binding on all nations." *Id.* The court only made that observation to demonstrate that it need not

the ATCA. Defendant Sosa's position would require the Court to conclude that an arbitrary detention violates international law for ATCA purposes, but entering another country to kidnap one of its citizens does not.

[31] As one example, Plaintiff cites the Restatement (Third) of Foreign Relations Law of the United States section 432(2) that a "state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." Reporter's note number one to that section commented, as early as 1986, that "[n]one of the international human rights conventions to date . . . provides that forcible abduction or irregular extradition is a violation of international human rights law. However, Articles 3, 5, and 9 of the Universal Declaration of Human Rights, as well as Articles 7, 9, and 10 of the International Covenant on Civil and Political Rights might be invoked in support of such a view."

dismiss the indictment pursuant to an overrrding principle of international law. The court did not decide whether customary international law prohibited kidnapping or consider the issue with respect to the ATCA. The Court finds that *Matta-Ballesteros* provides no insight into how the Ninth Circuit would resolve this case.

Sosa next contends that a universal consenscs does not exist that kidnapping violates international law. Sosa argues that a plethora of international abductions have occurred since 1835 and that no international agreement explicitly prohibits them. Sosa then cites a number *of* student notes in law reviews which suggest that international law does not prohibit abductions. Sosa also argues that because any norm against kidnapping does not rise to the level of *jus cogens* the ATCA does not allow recovery.

Plaintiff convincingly rebuts these arguments. He suggests that the simple fact that countries have performed international abductions does not mean that such actions do not violate international law. As Plaintiff points out, torture and even genocide occur frequently, but that fact does not suggest that the international community does not universally condemn such actions. In addition, the majority *of* scholarly analysis which deals with the topic concludes that transnational abduction violates customary international law. *See. e.g.*, Abraham Abramovsky, *Extraterritorial Abductions: America's 'Catch and Snatch' Policy Run Amok*, 31 Va. J. Int' l L. 151, 204-05 (1991) (stating that "abductions remain violations *of* both international law and the law *of* the asylum country. . . . customary international law is offended"). Finally, the ATCA only requires that an international law be "specific, universal, and obligatory." It does not require the international law to rise to the level *of jus cogens*. In fact, the most recent ATCA case in the Ninth Circuit, *Martinez*, found a clear international prohibition on arbitrary arrest and

detention without any mention *of* the prohibition rising to the level of *jus cogens*. 141 F.3d at 1384.

Defendant Sosa next suggests that the principle of state sovereignty does not support Plaintiff's claim because Plaintiff does not have standing to seek redress for a violation of Mexico's territorial integrity. Plaintiff correctly rebuts this argument by pointing out that the ATCA allows a Plaintiff to assert a cause of action for any violation of international law which amounts to a tort, as long as the law is specific, universal, and obligatory, Plaintiff points out that he offers two independent sources of international law: the principles of state sovereignty and international human rights which prohibit transborder abductions.

Finally, Sosa contends that the United States has rejected the idea that transnational abductions violate international law. Sosa explains that the Executive Branch has concluded that the actions at issue here do not violate international law and that the Bilateral Extradition Treaty with Mexico allowed the abduction. The Court disagrees with both contentions. First, Sosa relies on the "Barr Opinion," issued by the Office of Legal Counsel of the United States Departmant of Justice, to suggest that the Executive Branch finds extraterritorial abductions consistent with international law. Yet the Barr Opinion discusses an entirely different issue. 1989 O.L.C. Lexis 19. That opinion reversed a prior opinion of the Office of Legal Counsel and concludes that the President and the Attorney General have the power to order the Federal Bureau of Investigation to "carry out extraterritorial law enforcement activities that contravene customary international law." *Id.* at * 1. The opinion clearly assumed that extraterritorial abduction violates customary international law-the author merely concluded that the government has the ability to decide to contravene that law. Properly read, the Barr Opinion supports Plaintiff's claim that Defendant Sosa violated international law by abducting Plaintiff in Mexico. Sosa does not contend that the President or the Attorney General made the decision

to displace international law in the case of Plaintiff's abduction.

The Court also rejects Sosa's argument that the Extradition Treaty made Plaintiff's abduction lawful. The Supreme Court did find that Plaintiff's abduction did not violate the Extradition Treaty between the United States and Mexico and refused to incorporate principles of international law into the Treaty. *United States v. Alvarez-Machain*, 504 U.S. at 669-70 (1992). Yet as Plaintiff points out, the Court only found that the abduction did not violate the Treaty, not that it did not violate customary international law. In fact, Plaintiff's counsel, points out that the Supreme Court noted at oral argument that Plaintiff did "not argue that these sources of international law provide an independent basis for the right ... not to be tried in the United States." 504 U.S. at 666.

In short, the Court concludes that "specific, universal, and obligatory" norms of international law prohibit state-sponsored, transborder abductions. The Court does not find that these norms rise to the level of *jus cogens*, but nevertheless finds them sufficiently established and articulated to support a cause of action under the Alien Tort Claims Act. Because the parties agree that Defendant Sosa conducted a transborder abduction, the Court DENIES Defendant Sosa's motion for summary judgment and GRANTS Plaintiff's motion for summary judgment with respect to Plaintiff's first cause of action (kidnapping).

2. Cruel, Inhuman, and Degrading Treatment

Defendant Sosa offers two related arguments against Plaintiffs claim for cruel, inhuman, and degrading treatment. First, Sosa suggests that even if international law recognizes a prohibition on such treatment, that prohibition is not universal and definable. Second, Sosa contends that even if subsequent case law has given specific content to the claim of cruel, inhuman, and degrading treatment, it did not exist in 1990 at the time of Plaintiffs seizure and alleged mistreatment.

Defendant Sosa relies on a case from a district court in this circuit which concluded that a plaintiff could not prevail on a claim for cruel, inhuman, and degrading treatment because of the vagueness inherent in that concept, *Ford v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (*"Ford I"*). The *Forti* court felt that without a definition of what constitutes such treatment, it could not consider the cause of action. *Ford v. Suarez-Mason*, 694 F. Supp 707, 711-12 (N.D. Cal. 1988) (*"Forti II"*).

Plaintiff responds that international law clearly prohibits cruel, inhuman, and degrading treatment, and that prohibition has content which United States courts have enforced under the Alien Tort Claims Act. *See, e.g., Jama v. INS*, 22 F. Supp. 2d 353 (D.N.J. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 186-87 (D. Mass. 1995); *Abebe-Jiri v. Negewo*, 1993 WL 814304, *4 (N.D. Ga.), *aff'd*, 72 F.3d 844 (11th Cir. 1996).[32] One of these cases, *Xuncax*, struggled with the question of the content of the international norm. 886 F. Supp. at 186 ("it is evident that the prohibition against such treatment poses more complex problems of definition than are presented by the norms forbidding torture"). The *Xuncax* court rejected the argument that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of October of 1990 provided clarity to this norm. Ultimately, the court concluded that the United States Constitution provided the answer: "any act by the defendant which is proscribed by the Constitution of the United States and by a cognizable principle of international law plainly falls within the rubric of 'cruel, inhuman or degrading treatment' and is actionable before this Court under § 1350." *Id.* at 187.[33]

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[32] The Ninth Circuit has explicitly not reached this issue but did engage in a discussion about it with respect to its status as an international norm. *Sison v. Marcos*, 103 F.3d 789, 794-95 (9th Cir. 1997).

[33] In the other cases cited above, the courts appear to reach a similar conclusion without addressing the issue. In those cases, the courts found liability under a cruel, inhuman, and degrading treatment claim in situa-

The Court agrees with the cases that link the concept of cruel, inhuman, and degrading treatment to constitutional requirements. However, while a plaintiff might sustain a claim under the ATCA for certain types of treatment, the Plaintiff in this case may not do so for two reasons. First, the Court cannot say with any certainty that a universal consensus existed regarding the content of the tort at the time of the events in this case. International law clearly prohibited cruel, inhuman, and degrading treatment before 1990, *see Restatement (Third) of Foreign Relations Law* § 702(d), but events after 1990 helped to establish its content for purposes of the ATCA.[34] Second, more importantly, the law of the case prevents Plaintiff from maintaining this cause of action. Plaintiff has pled a variety of alleged mistreatment which supports his claim for cruel, inhuman, and degrading treatment. Yet, as noted above, the Ninth Circuit has already held a prior appeal in this case that no conduct occurred in Mexico which would violate Due Process. *Alvarez*, 107 F.3d at 702. Accordingly, Plaintiff cannot raise a triable issue of fact to support a claim for cruel, inhuman and degrading treatment because that claim depends on conduct sufficient to violate the Constitution. Plaintiff has raised a triable issue of fact regarding whether or not his treatment in Mexico amounts to an assault and battery, as discussed below. The preclusive effect of the law of the case prevents his cruel, inhuman, and degrading treatment claim. The Court therefore GRANTS Defendant Sosa's motion for summary judgment with respect to Plaintiff's third cause of action.

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tions where the conduct would also have violated the standards of United States Constitution.

[34] As noted above, the Senate did not consent to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment until October of 1990, and the *Xuncax* court relied, at least in part, on that action inits decision to utilize Constitutional principles.

3. Prolonged Arbitrary Detention[35]

This circuit has recognized the "clear international prohibition against arbitrary arrest and detention" and established the right of aliens to sue on this basis under the Alien Tort Claims Act. *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998). *See also Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987), *reconsidered on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988). The Ninth Circuit in *Martinez* explained that "detention is arbitrary 'if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Id.* (citing Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. h (1987)). Nevertheless, the court rejected Martinez's claim because the authorities arrested him pursuant to law, under a valid Mexican arrest warrant, and did not detain him for a long period of time without informing him of the charges or allowing him to contact his family. *Id.*

Defendant Sosa points out that he only kept Plaintiff in custody in Mexico for approximately twenty four hoursmuch less time than the Ninth Circuit approved in *Martinez*. Plaintiff's claim does not depend on the length of his detention, however. Plaintiff points out one crucial difference from the facts of *Martinez:* in that case, Mexican authorities arrested the wrong individual pursuant to a Mexican warrant at the behest of the United States. Thus in *Martinez*, the arrest occurred lawfully, albeit mistakenly, and the detention occurred in a manner consistent with common practice. In this case, Defendant Sosa appears to have detained Plaintiff without lawful authority.[36] The Ninth Circuit deems such a

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[35] As noted above, the Court will not decide the issue of summary judgment on this ground until after a further discussion with the parties at the pretrial conference.

[36] Freed from the strictures of the Federal Tort Claims Act, the Court can find Sosa's arrest of Plaintiff in Mexico unlawful. The Court could

detention arbitrary and the Court presumes that a detention of twenty four hours without any lawful basis can establish a claim for prolonged arbitrary detention.[37] The Court thus reports its inclination to grant summary judgment in favor of Plaintiff on this claim. Nevertheless, because Plaintiff did not move for summary judgment on this basis, the Court will reserve a ruling on Plaintiff's fourth cause of action (prolonged arbitrary detention) with respect to the detention that occurred in Mexico.[38]

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not find that action unlawful for purposes of the Federal Tort Claims Act, which required a narrow examination based on California law, for the reasons discussed above. Nevertheless, the Court may consider other sources of law against Defendant Sosa, and those sources demonstrate the lawlessness of the arrest. The Court has already deemed the action "kidnapping" in violation of international law. Defendant Sosa made the arrest in Mexico without any Mexican authority to do so. Accordingly, the Court can conclude that Sosa made an unlawful detention, even though the Court could not reach that conclusion with respect to Defendant United States because of the limitations in the Federal Tort Claims Act.

[37] Plaintiff argues that Defendant Sosa should face liability for the entire time of Plaintiff's detention from seizure in Mexico through the time in the United States. Plaintiff argues that Sosa knew that the United States would detain Plaintiff domestically and thus is rsponsible for that detention. However, from the time Plaintiff entered federal custody in the United States his detention ceased to be unlawful. Thus, at that point, it appears to the Court that Plaintiff did not suffer arbitrary detention. In addition, while Plaintiff did remain in custody for a significant period of time, the traditional protections afforded to criminal defendants attached to Plaintiff and he cannot claim that his detention was unnecessarily prolonged. Accordingly, the Court is inclined to limit summary judgment in favor of Plaintiff to Plaintiff's claim for prolonged arbitrary detention by Sosa in Mexico to the point of entry into the United States.

[38] The Court also notes that Plaintiffs cause of action for kidnapping and prolonged arbitrary detention appear to overlap in this case: either provides a basis for relief for Plaintiffs removal from Mexico to the United States. The Court has not yet considered the issue of damages, but asks the parties to consider the interrelation of these causes of action before the pretrial conference.

B. Remaining Claims

Plaintiff also asserts a number of other claims against Defendant Sosa. The Court will address these in less detail given the extensive treatment of the same claims against the United States and the other individual defendants.

1. Bivens

Plaintiff asserts a the same claim under *Bivens* against Defendant Sosa as he does against the other federal defendants. Because the Court found above that no constitutional violation occurred for the "seizure" in United States airspace, Plaintiff cannot recover on this claim. Accordingly, the Court GRANTS Defendant Sosa's motion for summary judgment on Plaintiffs fifth cause of action.

2. Assault and Battery

Plaintiff seeks to recover, under a common law theory of assault and battery, for the events surrounding his seizure and transportation to the United States. Defendant Sosa argues that Plaintiff does not offer any evidence that Sosa ever touched Plaintiff in any way and that the lawful nature of the arrest immunizes the force required to actually make the arrest itself. Plaintiff counters that the nature of the events prevented Plaintiff from identifying the individuals who assaulted him and thus Sosa can still face liability for his involvement. *See Ybarra v. Spangard*, 25 Cal.2d 486 (1944). While Sosa denies ever touching Plaintiff, or having any knowledge that any other individual injured him, Sosa does admit his involvement in the seizure and his presence at the house in which Plaintiff ways he faced abuse. The Court thus finds a triable issue regarding Sosa's behavior in Mexico.[39]

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[39] The Court's conclusion that Sosa lawfully arrested Plaintiff under the law of California might prevent liability based on the actual touching involved in the arrest itself. Nevertheless, the Court feels that a triable issue exists on events in Mexico and will consider this issue again at trial.

The Court notes that the preclusive effect of the Ninth Circuit ruling does suggest that no treatment occurred in Mexico that rose to the level of a violation the Fifth Amendment. Nevertheless, a wide range of conduct falls between a mere touching and a violation of the Constitution. Accordingly, the Court DENIES Defendant Sosa's motion for summary judgment with respect to Plaintiff's sixth cause of action (assault and battery).

3. False Arrest/False Imprisonment

Plaintiff also asserts a common law claim for false arrest/ false imprisonment based on the seizure in Mexico. The Court addressed this claim above in its discussion of the Federal Tort Claims Act. The Court believes that under California law, a court would find Defendant Sosa's actions lawful due to the citizen's arrest concept embodied in the state law.[40] Accordingly, the Court GRANTS Defendant Sosa's motion for summary judgment with respect to Plaintiff's seventh/ ninth cause of action (false arrest/false imprisonment).

4. Intentional Infliction of Emotional Distress

Plaintiff asserts a claim for intentional infliction of emotional distress against Defendant Sosa based on the alleged events from the time of the seizure in Mexico to Plaintiff's delivery to Agent Berrellez in El Paso. Defendant Sosa argues that Plaintiff cannot demonstrate any evidence of

[40] Of course, if a California court looked the law of Mexico to determine the lawfulness of the seizure, that court might conclude that Sosa's actions did amount to a false arrest or false imprisonment. As discussed above, this Court could not apply the law of Mexico to find the United States liable under the Federal Tort Claims Act, but Defendant Sosa could not assert a foreign claims exception. Nevertheless, because the court believes that a California court would apply its own law, the Court does not reach this issue. In practical terms, this cause of action appears to overlap with the one for kidnapping and arbitrary detention discussed above.

outrageous conduct as required to establish such a tort. For the same reasons as in the assault and battery section above, the Court feels that Plaintiff has raised a triable issue of fact on this ground. Accordingly, the Court DENIES Defendant Sosa's motion for summary judgment on Plaintiff's eighth cause of action.

VI. Conclusion

For all the reasons outlined above, the Court: (1) DENIES Defendant Sosa's motion for substitution; (2) GRANTS Defendant Bellerez, Graden Lawn, and Waters' motion for summary judgment; (3) GRANTS Defendant Garate-Bustamante's motion for summary judgment; (4) GRANTS Defendant United States' motion for summary judgment in part and DENIES that motion in part; (5) DENIES Plaintiff's motion for partial summary judgment against Defendant United States; (6) GRANTS Defendant Sosa's motion for summary judgment in part and DENIES that motion in part; and (7) GRANTS Plaintiff's motion for partial summary judgment against Defendant Sosa in part and DENIES that motion in part; (8) RESERVES ruling on Plaintiff's claim for prolonged arbitrary detention in violation of the Alien Tort Claim Act against Defendant Sosa pending further discussion at the pretrial conference. The Court expects to proceed to trial on Plaintiff's claims of assault, battery, and intentional infliction of emotional distress against Defendant Sosa based on his alleged conduct in Mexico and on Plaintiff's claim of intentional infliction of emotional distress against the United States based on the alleged actions of its agents in El Paso.

IT IS SO ORDERED.

DATED: 3/18/99

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-56603, 00-56628

JOHN DOE I, ET AL.,
Plaintiffs-Appellees,
v.
UNOCAL CORPORATION, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
For the Central District of California

BRIEF FOR THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-56603, 00-56628

JOHN DOE I, ET AL.,
Plaintiffs-Appellees,
v.
UNOCAL CORPORATION, ET AL.
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

INTRODUCTION AND SUMMARY

Pursuant to Rule 29(a), Fed. R. App. P., the United States of America hereby submits this *amicus curie* brief.

Especially in light of the numerous cases that have recently been litigated in United States courts based on the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), the United States has a substantial interest in the ATS' proper application. The ATS was enacted in 1789, as a jurisdictional provision. It ensures that federal [2] courts may entertain causes of action that are otherwise properly cognizable under the "law of nations" insofar as that law is made part of U.S. law (Art. I, Sec. 8, Cl. 10), or under "a treaty of the United States." It was an obscure provision, which was almost never invoked and which became even less relevant after the enactment of

general federal question jurisdiction and the elimination of the amount in controversy requirement.

In recent years, however, the ATS has been commandeered and transformed into a font of causes of action permitting aliens to bring human rights claims in United States courts, even when the disputes are wholly between foreign nationals and when the alleged injuries were incurred in a foreign country, often with no connection whatsoever with the United States.

In recent decisions, panels of this Court have made several fundamental analytical errors regarding the ATS. The Court has construed a statute that on its face merely confers subject matter jurisdiction as also affording an implied private right of action. Recent Supreme Court precedent, however, prohibits finding an implied private right of action in this jurisdictional grant. Moreover, it is clearly error to infer a right of action to enforce unratified or non-self-executing treaties, and non-binding United Nations General Assembly resolutions. Finally, contrary to the long-established presumption against extraterritorial application of a statute, [3] this Court has extended the causes of action recognized under the ATS to conduct occurring wholly within the boundaries of other nations, involving only foreign sovereigns or nationals, and causing no direct or substantial impact in the United States.

Under this new view of the ATS, it has become the role of the federal courts to discern, and enforce through money damage actions, norms of international law from unratified or non-self-executing treaties, non-binding United Nations General Assembly resolutions, and purely political statements. Although often asserted against rogues and terrorists, these claims are without bounds, and can easily be asserted against allies of our Nation. For example, such claims have already been asserted against foreign nationals who have assisted our Government in the seizure of criminals abroad.

See Alvarez-Machain v. *United States*, 266 F.3d 1045, 1051 (9th Cir. 2001), *vacated and rhg en banc granted*, 284 F.3d 1039 (9th Cir. 2002). This Court's approach to the ATS bears serious implications for our current war against terrorism, and permits ATS claims to be easily asserted against our allies in that war. Indeed, such claims have already been brought against the United States itself in connection with its efforts to combat terrorism. *See Al Odah* v. *United States*, 321 F.3d 1134, 1144-1145 (D.C. Cir. 2003) (ATS claims asserted by aliens detained at the U.S. Naval Base at Guantanamo Bay).

[4] Wide-ranging claims the courts have entertained regarding the acts of aliens in foreign countries necessarily call upon our courts to render judgments over matters that implicate our Nation's foreign affairs. In the view of the United States, the assumption of this role by the courts under the ATS not only has no historical basis, but, more important, raises significant potential for serious interference with the important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles.

While the United States unequivocally deplores and strongly condemns the anti-democratic policies and blatant human rights abuses of the Burmese (Myanmar) military government, it is the function of the political Branches, not the courts, to respond (as the U.S. Government actively is[1]) to bring about change in such situations. Although it may be tempting to open our courts to right every wrong all over the world, that function has not been assigned to the federal courts. When Congress wants the courts to play such a role, it enacts specific and carefully crafted rules, such as in the

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[1] *See* 67 Fed. Reg. 35423 (May 16, 2002) (order continuing sanctions against Burma); Dept. of State, CONDITIONS IN BURMA AND U.S. POLICY TOWARD BURMA FOR THE PERIOD SEPTEMBER 28, 2002-MARCH 27, 2003 (http://www.state.gov/p/eap/rls/rpt/burma/19554.htm).

Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note. The ATS, which is a simple grant of jurisdiction, cannot properly be construed as a broad grant of authority for the [5] courts to decipher and enforce their own concepts of international law. Thus, respectfully, the Government asks the Court to reconsider its approach to the ATS.

STATEMENT OF THE ISSUES

In this brief, the United States will address the following issues:

1. Whether the ATS permits a court to infer a cause of action to enforce international law norms discerned by the courts from documents such as unratified and non-self-executing treaties, and non-binding UN resolutions.

2. Whether the ATS applies to claims brought by aliens relating to acts in other countries.

ARGUMENT

I. THE ATS DOES NOT PROVIDE A CAUSE OF ACTION AND DOES NOT PERMIT A COURT TO INFER A CAUSE OF ACTION TO ENFORCE INTERNATIONAL LAW NORMS DISCERNED BY THE COURTS FROM DOCUMENTS SUCH AS UNRATIFIED AND NON-SELF-EXECUTING TREATIES, AND NON-BINDING RESOLUTIONS.

A. The ATS Is Merely A Jurisdictional Provision.

1. It is a fundamental mistake to read the ATS as anything but a jurisdictional provision. *See* Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 479-480 (1986) ("any suggestion that the statute creates a federal cause of action [6] is simply frivolous"). Congress passed this statute as part of the Judiciary Act of 1789. As slightly revised today, the ATS provides:

> [T]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. "The debates that led to the [Judiciary] Act's passage contain no reference to the Alien Tort Statute, and there is no direct evidence of what the First Congress intended it to accomplish." *Trajano* v. *Marcos*, 978 F.2d 493, 498 (9th Cir. 1992).

This jurisdictional statute remained virtually dormant for almost 200 years, until the Second Circuit, in 1980, for the first time gave it an expansive construction. *See Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). That court held that the ATS conferred subject-matter jurisdiction on federal courts to hear a dispute between citizens of Paraguay regarding torture allegedly committed in Paraguay. The court did not opine, however, on whether the ATS itself provided a cause of action.

Thereafter, in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir.), *cert. denied*, 470 U.S. 1003 (1984), both Judges Bork and Robb disagreed with *Filartiga* insofar as it allowed such a suit to proceed. Judge Bork explained that [7] the ATS was a jurisdictional statute only and did *not* provide plaintiffs a cause of action. *Id.* at 801-823. Judge Robb stated that the *Filartiga*'s approach was "fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." *Id.* at 826 n.5.[2]

In *Trajano*, however, this Court held that a court in an ATS action could define and enforce the law of nations as part of its common law powers. *See Trajano*, 978 F.2d at 499-502. Three years later in, *Hilao* v. *Estate of Marcos*, 25 F.3d 1467, 1474-76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995),

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[2] Judge Edwards wrote a separate opinion supporting dismissal of the ATS claim. He agreed with *Filartiga*, but believed that a torture claim could be asserted against a state actor. *Id.* at 777-798.

the Court expressly held for the first time that the ATS itself created a cause of action to enforce the "law of nations." The Court misread *Filartiga* as having so held[3] and simply followed *Filartiga* without independently examining the question.[4]

[8] The Court should now examine the issue in this en banc proceeding and should overrule *Trajano* and *Hilao* because they erroneously read the ATS as providing, or permitting a court to infer, a private right of action.

2. By its terms, the ATS vests federal courts with "original jurisdiction" over a particular type of action; it does not purport to *create* any private cause of action. An examination of the Judiciary Act of 1789 strongly supports that view. That Act in Sections 1 through 13 establishes the federal courts and delineates the jurisdiction of those courts. The ATS is set out in Section 9, adjacent to provisions establishing jurisdiction over crimes on the high seas, admiralty issues, and suits against consuls. *See* 1 Stat. 76 (1789). In context, the ATS is thus properly read as being solely a jurisdictional provision. *See* Ford, THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES, *Thomas Jefferson Papers Series 1. General Correspondence* (Dec. 3, 1792 Jefferson letter citing the "act of 1789, chapter 20, section 9" as a statute "describing the *jurisdiction of the Courts*") (emphasis added) (available at http://memory.loc.gov/ammem/mtjhtml/mtjhome.html); *cf. Montana-Dakota Co.* v. *Northwestern Pub. Serv.*, 341 U.S. 246, 249 (1951) ("The Judicial Code, in [9] vesting jurisdiction in the District Courts, does not create

[3] *See Filartiga* v. *Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984) ("We must now face the issue left open by the Court of Appeals, namely, the nature of the 'action' over which [the ATS] affords jurisdiction").

[4] The Eleventh Circuit thereafter held that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996).

causes of action, but only confers jurisdiction to adjudicate those arising from other sources").[5]

Although there is no direct legislative history regarding the ATS, many scholars agree that Congress passed this jurisdictional provision, in part, in response to two high profile incidents of the time concerning assaults upon foreign ambassadors on domestic soil (*Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (1784); *Report of Secretary for Foreign Affairs on Complaint of Minister of United Netherlands*, 34 J.Cont. Cong. 109, 111 (1788)). *See, e.g.*, Casto, 18 Conn. L. Rev. at 488-498. These two cases raised serious questions of whether the then-new federal institutions would be adequate to avoid international incidents that could arise if such matters were left to the state courts. *Id.* at 490-494.

At the time, "denial of justice" to one's own citizens abroad was a justification for a country to launch a war of reprisal. E. De Vattel, THE LAW OF NATIONS, bk. II, ch. XVIII, §350, at 230-231 (Carnegie ed. trans. Fenwick 1916) (1758 ed.). For example, Edmund Randolph commented that, without an adequate federal forum, "[i]f the rights of an ambassador be invaded by any citizen it is only [10] in a few States that any laws exist to punish the offender." Letter from Edmund Randolph, Governor, Virginia, to the Honorable Speaker of the House of Delegates (Oct. 10, 1787). James Madison also feared the country's inability to "prevent those violations of the law of nations & of treaties which if not prevented must involve us in the calamities of foreign wars." 1 M. Farrand, RECORDS OF THE FEDERAL CONVENTION, 316 (1911). Notably, the protection of ambassadors is one of the

[5] As we discuss below, a court's authority to adjudicate admiralty cases by reference to non-statutory law is based upon a distinct clause of the Constitution and a unique history and background, and does not authorize a court to create causes of action to enforce international law norms under the ATS. *See* pp. 24-25, *infra*.

three classic protections afforded by the law of nations, as given effect in domestic law. William Blackstone explained that "[t]he principal offences against the law of nations as animadverted upon by the municipal laws of England are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy." 4 W. Blackstone, COMMENTARIES, 67-68 (1783).

Article III jurisdiction is not self-vesting. Congress did not enact a general federal question statute until much later. The ATS, however, permitted the federal courts to hear one subset of "arising under" cases—*i.e.*, those arising under Acts of Congress incorporating principles of the "law of nations" into the laws of the United States or under "treaties of the United States." In this way, the First Judiciary Act ensured that the federal courts would have jurisdiction over any claim brought by an ambassador, or other alien, seeking redress for a violation of such traditional law of nations protections. Then, the next year, invoking its [11] constitutional authority to define and punish violations of the "Law of Nations," *see* Article I, Sec. 8, Cl. 10, Congress made assaults on ambassadors (as well as the two other traditional violations of the "law of nations" identified by Blackstone (piracy and violating the right of safe conduct)) offenses under the federal law. 1 Sta . 113-115, 117-118. Thus, the origins of the ATS are consistent with an understanding that it grants the federal courts subject matter jurisdiction over only those claims brought to enforce the "law of nations" insofar as that law has been affirmatively incorporated into the laws of the United States.

Under this understanding of the ATS (and Supreme Court jurisprudence regarding the recognition of causes of actions under federal law), *Congress* must enact a cause of action (or provide a basis for inferring a cause of action). Such causes of action would also fall within the present-day federal question jurisdiction (28 U.S.C. § 1331). While this interpretation may

appear to render the ATS superfluous today, it would not have been so in 1789. General federal question jurisdiction was not enacted until nearly 100 years later, in 1875, and until 1980, that jurisdictional grant contained a minimum amount-in-controversy requirement. The courts have recognized that the elimination of the amount-in-[12] controversy requirement in 1980, rendered numerous jurisdictional provisions superfluous.[6]

Accordingly, although the ATS is somewhat of a historical relic today, that is no basis for transforming it into an untethered grant of authority to the courts to establish and enforce (through money damage actions) precepts of international law regarding disputes arising in foreign countries. Moreover, as we discuss next, this Court has erred to the extent that it has permitted ATS actions to proceed based on asserted international norms stemming from documents such as unratified and non-self-executing treaties, and non-binding United Nations General Assembly resolutions.

B. Neither The ATS Itself, Nor International Law Norms, Based On Documents Such As Unratified And Non-Self-Executing Treaties, And Non-Binding UN Resolutions, Provide Any Basis For Inferring A Cause Of Action.

1. International law does not generally provide causes of action enforceable in federal court. *See Tel-Oren*, 726 F.2d at 779 ("the law of nations consciously leaves the provision of rights of action up to the states") (Edwards, J., concurring); *id.* at 810 (Bork, J., concurring). *See also* Christenson, *Federal Courts and World* [13] *Civil Society*, 6 J. Transnat'l L & Policy 405, 511-512 (1997) ("U.S. courts will not incorporate a cause of action from customary international

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[6] *See, e.g., Erienet, Inc.* v. *Velocity Net, Inc.*, 156 F.3d 513, 520 (3rd Cir. 1998) (28 U.S.C. § 1337 superfluous); *Winstead* v. *J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991) (§§ 1337, 1340, and 1343 superfluous).

law"). This Court, however, has read the ATS statute as itself providing an implied cause of action to enforce international law norms. Reading the ATS' grant of jurisdiction as a broad implied right of action cannot today be reconciled with the Supreme Court's repeated refusal in recent decisions to recognize implied private causes of action. *See, e.g., Alexander* v. *Sandoval*, 532 U.S. 275 (2001). As the Court emphasized in *Sandoval*, it has "sworn off the habit of venturing beyond Congress's intent" when it comes to recognizing implied private rights. *Sandoval*, 532 U.S. at 287. And the renunciation of that "habit" of inferring private causes of action applies equally to older statutes, such as the ATS. *Ibid.*

Under controlling Supreme Court precedent, a court must focus on whether the statute at issue has "'rights-creating' language." *Sandoval*, 532 U.S. at 288. The ATS is demonstrably a *jurisdiction*-vesting statute. Although it refers to a particular type of claim (*i.e.*, a "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"), it does not purport to create any particular statutory *rights*, much less rights that in turn could be interpreted to confer a private right of action for money damages. Thus, under [14] the governing analysis established by the Supreme Court, it is plainly erroneous to construe the ATS itself as conferring a private cause of action.

2. Moreover, it is clearly improper to infer a cause of action when the documents relied upon by this Court to discern norms of international law were not themselves intended by that the Executive or Congress to create rights capable of domestic enforcement through legal actions by private parties.

Although this Court has said that violations of international law "must be of a norm that is specific, universal, and obligatory" to be actionable under the ATS, *Hilao*, 25 F.3d at 1475, the Court has not actually applied those standards.

Instead, it has found an implied right of action to enforce rights based upon international agreements that the United States has refused to join, *non*binding agreements, and agreements that are not self-executing, as well as political resolutions of UN bodies and other non-binding statements. *See, e.g., Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 714-716 (9th Cir. 1991); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998); *Alvarez-Machain*, 266 F.3d at 1051. None of these documents is "obligatory" in the sense that is critical for present purposes, because none in itself creates duties or rights enforceable by private parties in court. The Court has erroneously transformed these non-binding, non-self-executing documents —none of which [15] remotely creates a private cause of action—into sources of binding obligatory rights actionable in private suits for damages in federal court.

If the United States refuses to ratify a treaty, or regards a U.N. resolution as non-binding, or declares a treaty not to be self-executing, there obviously is no basis for a court to infer a cause of action to enforce the norms embodied in those materials. *See Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring) (to enforce such agreements "is anti-democratic and at odds with principles of separation of powers"). As to treaties or conventions not ratified by the United States, it is clearly inappropriate for the courts to adopt and enforce principles contained in instruments that the President and/or the Senate have declined to embrace as binding on the United States, or enforceable as a matter of U.S. law through judicially-created causes of action. And, where a treaty is ratified but is not self-executing (as modern human rights treaties have been declared by the President and the Senate not to be), such a treaty neither creates a cause of action nor provides rules that a court may properly enforce in a legal action brought by a private party. As the Supreme Court has held, a non-self-executing treaty "addresses itself to the political, not the judicial department; and the legislature must

execute the [treaty] before it can become a rule for the Court." *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.). *See also* RESTATEMENT [16] (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987) (emphasis added). Despite this established principle, this Court has, for example, based ATS claims on the International Covenant on Civil and Political Rights ("ICCPR"). *Martinez*, 141 F.3d at 1384; *Alvarez-Machain*, 266 F.3d at 1051-1052. That treaty is non-self-executing, *see, e.g., Buell* v. *Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001), and therefore clearly does not itself provide a private cause of action and cannot furnish a basis for a court to infer one.[7]

Furthermore, the labeling of an international law norm, derived from unratified agreements, etc., as "*jus cogens*" violations, *see Siderman de Blake*, 965 F.2d at 714, does not grant any greater legitimacy to judicial enforcement of such norms. Like the other types of perceived international law norms mistakenly enforced by this Court under the ATS, "the content of the *jus cogens* doctrine * * * emanates from academic commentary and multilateral treaties, even when unsigned by the United States." *Sampson* v. *Federal Republic* [17] *of Germany*, 250 F.3d 1145, 1155 (7th Cir. 2001). Such sources do not authorize a court to infer a federal cause of action when the political Branches have elected not to use their powers to create one. *See* Christenson, *supra*, 6 J. Transnat'l L & Policy at 485 ("courts in the United States have uniformly rejected application of an asserted *jus cogens* norm as the sole basis for a cause of action."). *Cf. Blankenship* v. *McDonald*, 176 F.3d 1192, 1195 (9th Cir. 1999) (a *Bivens* cause of action should not be recognized where "congressional action has not been inadvertent in providing certain remedies and denying others to judicial employees").

[7] Even where a treaty is self-executing, that fact does not necessarily mean that it provides a cause of action. Rather, it means only that the treaty is "regarded in courts of justice as equivalent to an act of the legislature." *Foster*, 27 U.S. at 314. Like an Act of Congress, a treaty may establish legal standards or rules of decision in litigation without itself creating a private right of action. *See, e.g., Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (explaining that the treaties at issue "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs," but did not "create private rights of action for foreign corporations to recover compensation from foreign states in United States courts").

This Court's approach of looking to unratified agreements to discern the "law of nations" under the ATS cannot be squared with the text of the ATS, which refers to both "treaties of the United States" and the "law of nations." The obvious import of the reference to treaties is that an international agreement must be a *ratified* treaty of the United States, receiving the advice and consent of the Senate, *before* it could be subject to enforcement in a private suit resting on the jurisdiction of the ATS (assuming further that the treaty confers a private right of action, *see* pp. 15-16 n.7, *supra*). This Court, however, has erroneously construed the ATS to imply a cause of action to enforce such norms even where the [18] Executive and Congress have declined to embody the norms in a binding or domestically enforceable law or treaty.

For example, in *Alvarez-Machain*, *supra*, a panel of this Court allowed a claim for a transborder arrest authorized by the U.S. Government even though "no international human rights instruments [even] refers to transborder abduction specifically." 266 F.3d at 1051. The panel erroneously relied upon, *inter alia*, general provisions of the Universal Declaration of Human Rights[8] (a non-binding resolution of the General Assembly of the United Nations), the American Convention on Human Rights[9] (which the Senate *refused* to

[8] G.A. Res. 218A, U.N. GAOR, U.N. Doc. A/810 (1948). Similarly, here, the panel relied upon the Universal Declaration of Human Rights.

[9] 9 I.L.M. 673 (July 4, 1977).

ratify), and the ICCPR (a non-self-executing treaty). *Id.* at 1051-1052. These documents plainly do not create domestically enforceable *rights*. A court cannot properly find enforceable rights in the American Convention on Human Rights, where the Senate has refused to ratify that convention. And even as to the ICCPR, which is a treaty, when ratified by the United States, the Senate and the Executive Branch (as it has with other modern human rights treaties[10]) expressly agreed that it would *not* be [19] self-executing and may *not* be relied upon by individuals in domestic court proceedings. *See* S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-71 (Apr. 2, 1992). It is flatly inconsistent with that decision of the political Branches for a court to infer a cause of action to enforce the terms of the agreement.

In certain areas, of course, a court, in connection with a matter already properly pending before it, may properly look to norms of international law to furnish a rule of decision, *e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900). That is very different from a court's inferring a cause of action as an initial matter based on international law. But even where a court may properly look to international law norms, it does so only *in the absence* of a "controlling executive or legislative act * * *." *The Paquete Habana*, 175 U.S. at 700. A ratified treaty accompanied by an express declaration that it is not self-executing is plainly such a controlling act. Similarly, the existence of a treaty or convention that has been ratified by some nations and even signed by the United States (but not

[10] In addition to the ICCPR, the Senate either expressly conditioned its consent or clearly understood that the Genocide Convention, the Torture Convention, and the Convention on the Elimination of All Forms of Racial Discrimination would not be self-executing. *See* 140 Cong. Rec. S14326 (daily ed. June 24, 1994); 136 Cong. Rec. S17491, S17486-01 (daily ed., Oct. 27, 1990); 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994); 132 Cong. Rec. S1355-01, S1378 (daily ed. Feb. 19, 1986).

yet ratified) falls in the same category, because the political Branches have taken the matter [20] fully in hand, but not yet taken the necessary steps to make the treaty binding on the United States; the treaty therefore cannot properly be relied upon in our courts as a source of the law of nations. And United Nations General Assembly resolutions are (with narrow exceptions) not binding on the member nations, and require further action by the member states before they can create any enforceable rights. *See* G. Schwarzenberger & E.D. Brown, A MANUAL OF INTERNATIONAL LAW 237 (1976). The actions or inactions of the political Branches with respect to those instruments must be deemed dispositive with respect to what effect they have on the law of nations to be applied within the United States. Thus, it is plainly wrong to infer a cause of action to enforce such documents in a suit for damages when the political Branches have elected not to do so.

3. Even beyond the general prohibition against judicial inferring of a cause of action, there are additional compelling reasons against inferring a cause of action (or creating common law causes of action to enforce international law norms) when the political Branches have not done so. In other contexts, courts refuse to infer causes of action where they implicate matters that by their nature should be left to the political Branches. *See FDIC* v. *Meyer*, 510 U.S. 471, 486 (1994). Matters that implicate international affairs are the quintessential example of a context where a court may not infer a cause of action. Permitting such [21] implied causes of action under the ATS infringes upon the right of the political Branches to exercise their judgment in setting appropriate limits upon the enforceability or scope of treaties and other documents.

The Supreme Court has long recognized that the Constitution commits "the entire control of international relations" to the political Branches. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705 (1893). *See Oetjen* v. *Central*

Leather Co., 246 U.S. 297, 302 (1918) ("[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments."). It is the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" to decide the "important complicated, delicate and manifold problems" of foreign relations. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936). Because the Constitution has so committed the power over foreign affairs, the Supreme Court has strongly cautioned the courts against intruding upon the President's exercise of that authority. *See ibid.* Indeed, the Supreme Court has recognized that foreign policy are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chicago & So. Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948).

[22] Despite this instruction from the Supreme Court, the types of claims that are being asserted today under the ATS are fraught with foreign policy implications. They often involve our courts in deciding suits between foreigners regarding events that occurred within the borders of other nations, and in the exercise of foreign governmental authority. The ATS has been wrongly interpreted to permit suits requiring the courts to pass factual, moral, and legal judgment on these foreign acts. And, under this Court's approach, ATS actions are not limited to rogues and outlaws. As mentioned above, such claims can easily be asserted against this Nation's friends, including our allies in our fight against terrorism. A plaintiff merely needs to accuse a defendant of, for example, arbitrary detention to support such a claim. Indeed, that approach has already permitted an alien to sue foreign nationals who assisted the United States in its conduct of international law enforcement efforts. *See Alvarez-*

Machain, 266 F.3d at 1051.[11] As noted above, this Court's approach to the ATS therefore bears serious implications for our current war against terrorism, and permits ATS claims to be asserted against our allies in that war. Notably, such claims have already been brought against the [23] United States itself in connection with its efforts to combat terrorism. *See Al Odah* v. *United States*, *supra*.

As interpreted by this Court in previous decisions, the ATS thus places the courts in the wholly inappropriate role of arbiters of foreign conduct, including international law enforcement. Where Congress wishes to permit such suits (*e.g.*, through the TVPA), it has done so with carefully prescribed rules and procedures. The ATS contains no such limits and cannot reasonably be read as granting the courts such unbridled authority.

4. Moreover, while Congress can and has created specific offenses, such as piracy, in reference to the "Law of Nations," *see Ex Parte Quirin*, 317 U.S. 1, 30 (1942), it is error to read the ATS' reference to the "law of nations" as granting the judiciary the wholesale power, without direction from the legislature, to define and enforce customary international law through civil damage actions. There is no basis for holding that, by referencing the "law of nations" in the ATS, Congress must have intended to permit the Judicial Branch to engage in a free-wheeling exercise to develop its own views of "customary international law," based on sources that are neither law nor customary, such as unratified treaties and other non-binding documents.

[24] In some instances a court can, as we have noted, look to international law where "questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. at 700. That principle does not, however,

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[11] That ruling has, however, been vacated pending the *en banc* panel's ruling in that case.

lead to the conclusion that international law provides a private cause of action to be pursued under the ATS. Even where international law norms are considered part of federal common law (*e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964)), they do not supply a private right of action. *See Tel Oren*, 726 F.2d at 811 (Bork, J. concurring) ("[t]o say that international law is part of federal common law * * * is not to say that, like the common law of contract and tort, for example, by itself it affords individuals the right to ask for judicial relief").[12]

[25] Those supporting an expansive view of the ATS might nevertheless argue that a federal court can enforce international law under the ATS just as it enforces admiralty law under its common law powers. It has been long understood, however, that "the body of admiralty law referred to in Article III did not depend on any express or implied legislative action. Its existence, rather, preceded the adoption of the Constitution." *R.M.S. Titanic, Inc.* v. *Haver*, 171 F.3d 943, 960 (4th Cir. 2000). *See also The American Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 544-545 (1828). The Framers drafted Article III with this full body of

[12] This is not to suggest that the international norms are enforceable as a part of *state* common law. Enforcement of such norms as a matter of state law would be inconsistent with the constitutional grant of responsibility over foreign affairs to the Federal Government, to the exclusion of the states. *See Zschernig* v. *Miller*, 389 U.S. 429 (1968); *Tel Oren*, 726 F.2d at 805 n.11 (Bork, J. concurring). That is especially so with respect to norms derived from ratified or unratified treaties, resolutions, and similar documents that have been relied upon in this and other suits under the ATS, for those documents are the work of the political Branches. For that reason, the absence of enforceable rights in those documents, and the refusal by the political Branches to give them enforceable domestic effect, constitute "controlling executive or legislative act[s]," *The Paquete Habana*, 175 U.S. at 700, that preclude reliance on those documents as a source of rights enforceable in a private suit for damages under state law.

maritime law "clearly in view." *R.M.S. Titanic*, 171 F.3d at 960. Thus, the reference in Article III to "all Cases of admiralty and maritime Jurisdiction" has been read as authorizing "the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising admiralty jurisdiction." *Id.* at 961. *See also United States* v. *Flores*, 289 U.S. 137, 148 (1933) (Section 2 of Article III "has been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies").

Admiralty law is thus manifestly unique and does not support reading the ATS as granting the courts common law authority to create implied causes of action enforcing vague concepts of international law through an ATS claim. [26] Notably, there is no similar express grant in Article III for the general enforcement of the Law of Nations, as there is for admiralty law. Rather, the power to define and legislate causes of actions regarding Law of Nations offenses is assigned to Congress under Article I. *See* Art. I, Sec. 8, Cl. 10. Nor, unlike the admiralty law situation, was there a pre-constitutional history of more than 1,000 years of specialized courts enforcing international law norms relating to human rights.

C. The TVPA Also Does Not Support Inferring A Cause Of Action Under The ATS.

In embracing an expansive view of the ATS, some courts have asserted that Congress ratified *Filartiga* and its progeny when it enacted the Torture Victim Protection Act. *See* Goodman & Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463, 514 (1997). The TVPA expressly provides a cause of action for damages to persons who suffered torture at the hands of any individual acting under the law of any foreign nation. *See* 28 U.S.C. § 1350 note.

In reporting on the TVPA, the Senate Committee did observe that the TVPA would provide "an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 * * * which permits Federal district courts to hear claims by aliens for torts committed in violation of [27] the law of nations." S. Rep. 102-249 at 4 (1991). The report noted that the "*Filartiga* case has met with general approval," but also recognized that at "least one Federal judge, however, has questioned whether section 1350 can be used * * * absent an explicit grant of a cause of action by Congress." *Id.* 4-5. The report stated that the TVPA was not intended to displace Section 1350, and concluded that the latter "should remain intact." *Id* at 5. *See also* H.R. Rep. No. 102-367 at 4 (1991).

Based on these *1991* legislative statements regarding a statute enacted in *1789*, some have argued that, regardless of the best reading of the ATS or of the original validity of *Filartiga*, the TVPA evidences Congressional approval of reading the ATS to provide a cause of action. A Congressional committee statement in 1991 about the meaning of the ATS, however, is obviously of no value in discerning the intent of Congress in *1789*. In a similar context, the Supreme Court recently refused to look to legislative history from 1986 setting forth "a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier." *Vermont Agency of Natural Resources* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000). As Judge Randolph explained, "the wish expressed in the committee's statement [about the TVPA] is reflected in no language Congress enacted; it does not purport to rest on [28] an interpretation of § 1350; and the statement itself is legislative dictum." *Al Odah*, 321 F.3d at 1146 (Randolph, J., concurring).

[29] II. NO CAUSE OF ACTION MAY BE IMPLIED BY THE ATS FOR CONDUCT OCCURRING IN OTHER NATIONS.

This Court has further compounded the significance of its erroneous application of the ATS by inferring causes of actions for acts occurring within other nations. Even if the ATS could be read to imply (or permit the implication) of a cause of action, it cannot be construed to have that effect in the territory of other nations. Unless expression to the contrary is found within a federal statute, that statute is presumed to apply only within the territory of the United States, or, in limited circumstances, on the high seas. *See Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284-285 (1949). This presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991). It dates back to the time the ATS was enacted. Its earliest express application by the Supreme Court is found in *United States* v. *Palmer*, 16 U.S. 610 (1818), where the Court held that a federal piracy statute should not be read to apply to foreign nationals on a foreign ship. *Id.* at 630-31.

Nothing in the ATS or in its contemporaneous history suggests an intent on the part of Congress that it would furnish a foundation for suits based on conduct occurring within other nations. Notably, the only reported cases where courts [30] mentioned the ATS after its recent enactment both involved *domestic* incidents—the capture of a foreign ship in U.S. territorial waters and seizure of slaves on a ship at a U.S. port. *See Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793); *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795). Moreover, Attorney General Bradford, while noting the availability of ATS jurisdiction for offenses on the high seas in 1795, also explained that insofar "as the transactions complained of

originated or took place in a foreign country, they are not within the cognizance of our courts." *See* 1 Op. Att'y Gen. 57, 58 (1795).[13]

As discussed above, many commentators believe that Congress passed the ATS in part to respond to two high profile incidents concerning assaults upon foreign ambassadors *on domestic soil*. *See* pp. 9-10, *supra*. Congress enacted the ATS because it wanted to ensure a federal forum so that traditional international law offenses (assaults against ambassadors and interference with the right of safe conduct) committed in this country were subject to proper redress. The point of the ATS was to *avoid* conflict with other countries.

[30] That logic does not support expanding the ATS to encompass claims arising in other nations. Other nations did not in 1789 (and certainly do not today) expect our courts to provide civil remedies for disputes between their own citizens (or involving third-country nationals) that occur on their own soil. *See* THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, Fitzpatrick, ed., Letter of George Washington to James Monroe, August 25, 1796 ("no Nation had a right to intermeddle in the internal concerns of another") (available at http://memory.loc.gov/ammem/gwhtml/gwhome.html); *United States* v. *La Juene Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822) (Story, J.) ("No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns"). To the contrary, litigating such disputes in this country can itself lead to objections from the foreign nations where the alleged injury occurred. "[T]hose who

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[13] *See also* 1 Op. Att'y Gen. 29, 29 (1792) ("[t]he bringing away of slaves from Martinique, the property of residents there, may be piracy, and, *depending upon the precise place of its commission*, may only be an offence against the municipal laws") (emphasis added).

drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations * * *. A broad reading of section 1350 runs directly contrary to that desire." *Tel-Oren*, 726 F.2d at 812 (Bork, J.).

[32] CONCLUSION

For the foregoing reasons, this Court's prior ATS precedents should be overruled, and this case should be remanded for application of a more limited construction of the statute.

Respectfully submitted,

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APPENDIX G

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

July 29, 2002

Honorable Louis F. Oberdorfer
United States District Court for
The District of Columbia
333 Constitution Ave., NW
Washington, D.C. 20001

Re: *Doe, et al. v. ExxonMobile, et al.*
No. 01-CV-1357 (DDC)

Dear Judge Oberdorfer:

This is in response to your letter of May 10, in which you invite the views of the Department of State in connection with the above-captioned proceedings. Specifically, you inquire "whether the Department of State has an opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States, and, if so, the nature and significance of that impact." As you requested, this letter specifically addresses the potential adverse impacts of the litigation on U.S. interests. It does not address the legal issues before the court.

For the reasons detailed below, the Department of State believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism. It may also diminish our ability to work with the Government of Indonesia ("GOI") on a variety of important programs, including efforts to promote human rights in Indonesia.

[2] However, before describing those concerns, the Department would like to reaffirm its condemnation of human rights abuses by elements of the Indonesian armed forces in locations such as Aceh. Without expressing a view on the allegations in this specific lawsuit, we would like to reiterate that a lasting, peaceful solution to the Aceh conflict that maintains Indonesian sovereignty can only be achieved if the military and police end human rights abuses. The Department will continue to work vigorously to bring such abuses to an end through diplomatic and other means.

With respect to this litigation, it is the Department's considered opinion that adjudication at this time could adversely affect United States interests in two ways, recognizing that such effects cannot be determined with certainty.[1] First, the GOI may respond to the litigation by curtailing cooperation with the United States on issues of substantial importance to the United States. Second, the litigation's potential effects on Indonesia's economy could in turn adversely affect important United States interests.

Potential Bilateral Effects

In our experience, the government and people of Indonesia react most negatively to any perceived intrusion into areas of Indonesian sovereignty. We anticipate that adjudication of this case will be perceived in Indonesia as a U.S. court trying

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[1] Much of this assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation. E.g., the nature, extent, and intrusiveness of discovery; the degree to which the case might directly implicate matters of great sensitivity to the Government of Indonesia and call for judicial pronouncements on the official actions of the GOI with respect to the conduct of its military activities in Aceh; the effect that a decision in favor of plaintiffs might encourage secessionist activities in Aceh and elsewhere in Indonesia; whether the case were to go to a jury and, if so, whether a substantial monetary award were to be imposed on Exxon Mobil; how other large commercial interests might interpret such a judgment when making investment decisions in Indonesia.

the GOI for its conduct of a civil war in Aceh. All of the human rights abuses and injuries alleged in the complaint refer to conduct claimed to have been committed by the military and police forces of the GOI. This issue presents special sensitivities for Indonesia because it is deeply concerned about maintaining national cohesion in the face of strong anti-government secessionist movements in Aceh and elsewhere. The [3] Indonesian response to such perceived U.S. "interference" in its internal affairs could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform.

This lawsuit could potentially disrupt the on-going and extensive United States efforts to secure Indonesia's cooperation in the fight against international terrorist activity. Indonesia is the fourth largest state in the world, with a population of some 210 million. It is also the largest Muslim nation, and serves as a focal point for U.S. initiatives in the ongoing war against Al Qaida and other dangerous terrorist organizations. U.S. counter-terrorism initiatives could be imperiled in numerous ways if Indonesia and its officials curtailed cooperation in response to perceived disrespect for its sovereign interests.

The United States also is actively seeking to assist Indonesia in reform efforts aimed at ending the kinds of abuses alleged in this litigation. Through improved training and support of security personnel, as well as judicial reform, these programs are designed to establish a higher degree of professionalism, and respect for individual rights. Should the GOI withdraw from these programs in reaction to the litigation, it will impact adversely on our goal of improving Indonesia's treatment of all members of its population, including the people of Aceh. An adverse effect on our human rights objectives is also possible if the GOI were to turn down U.S. companies bidding for new contracts in

response to the suit. Working side-by-side with U.S. firms, Indonesian companies and government agencies see the advantages of modern business practices including transparency, respect for contracts, fair labor practices, anti-corruption, efficiency, and competitiveness. We would expect that foreign companies, such as from the People's Republic of China (CNOOC and PetroChina both acquire multi-million dollar rights to Indonesian oil and gas fields this year), would be far less concerned about human right abuses, or about upholding best business practices.

Potential Effect on Indonesia's Stability

Economic and political stability in Indonesia is important to U.S. interests in the region. Given Indonesia's large population, resources, key geographic [4] location, and proximity to key U.S. allies, instability there could create problems ranging from interruption in vital shipping lanes, to refugee outflows, to a new home for terrorists. To the extent this litigation contributes to a worsening of the economic conditions in Indonesia that breed instability it would adversely affect U.S. interests.

Here, timing is an important consideration, because there is already substantial evidence that Indonesia's foreign investment climate is deteriorating. The GOI's Investment Coordinating Board (BKPM), for example, reported that foreign direct investment approvals dropped 88 percent in the first quarter of 2002 (US$ 291.5 million) compared to the first quarter of 2001 (US$ 2.44 billion). Total BKPM foreign direct investment approvals for 2001 also dropped 41.5 percent from the previous year. While the dollar value of investment proposals may be inflated and many proposals do not necessarily result in actual projects, the magnitude of the change confirms that the underlying trend is worsening.

This litigation appears likely to further discourage foreign investment, particularly in extractive industries in remote or

unstable areas that require security protection. This, in turn, could have decidedly negative consequences for the Indonesian economy. Revenues from the oil and gas sector, for example, are one of the core contributors to GOI budget revenues, comprising 35 percent of the Indonesian Government's total revenues in 2001. In the last few years, oil and gas revenues (including taxes on the sector) have become an increasingly important source of government funds, comprising 19, 23, and 31 percent of total government revenue respectively in 1998, 1999, and 2000. In addition, oil and gas revenues, which are received in U.S. dollars, offer important protection for the GOI from foreign exchange risk. However, in order to maintain its current level of revenues from the sector, Indonesia must develop new fields, or invest further to maintain production at existing oil and gas fields. More generally, Indonesia must maintain a growing economy to deal with the effects of the 1997-98 financial crisis, which left the GOI with the costs of a Rp 660 trillion (US$ 75 billion) bank bailout. Efforts by the U.S. and other donors to enhance Indonesia's fiscal sustainability thorough debt rescheduling and international lending programs will be undermined if Indonesia cannot sustain its own commitments.

[5] A viable, well-funded central government is also important to U.S. interests in domestic Indonesian policies. Providing more and higher quality public services, especially education and health services, is a key factor in reducing poverty and maintaining political stability. Given its size and large population, any threat to Indonesia's political stability could impact on the security of U.S. treaty allies Australia and Thailand, as well as other countries in the region. Adequate government resources are also necessary to maintain properly trained and equipped security forces that do not need to rely on unregulated and often corrupt business dealings, practices which contribute to actions outside of a central chain of command. Professional personnel are also crucial for making progress on a host of U.S. priorities,

including promoting regional stability, countering ethnic and sectarian violence, combating piracy, trafficking of persons, smuggling, narcotics trafficking, and environmentally unsustainable levels of fishing and logging. Litigation in the U.S. that discourages further investment in Indonesia poses a risk of weakening the Indonesian economy in conflict with these U.S. goals.

In this respect, we note that increasing opportunities for U.S. business abroad is an important aspect of U.S. foreign policy. Under the circumstances presented here, the adjudication of these claims could prejudice the Government of Indonesia and Indonesian businesses against U.S. firms bidding on contracts in extractive and other industries.

For the information of the Court, I am enclosing a copy of a letter received on July 15, 2002, from Indonesia's Ambassador to the United States Soemadi Djoko M. Brotodiningrat to Deputy Secretary of State Richard Armitage. In the letter Ambassador Soemadi expresses his government's objections to the continued adjudication of this case. He states that Indonesia views this litigation as an unacceptable extraterritorial act that will complicate efforts to safeguard foreign investors and will [6] negatively impact Indonesia's struggle to secure economic recovery. He also states that the case will have an adverse impact on effort towards peace in Aceh, which is at an extremely sensitive stage.

Sincerely,

/s/ William H. Taft
WILLIAM H. TAFT, IV
The Legal Advisor

Enclosure:
Letter from Indonesian Ambassador